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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-447

THE UNIVERSITY OF MISSOURI, et al.,
Petitioners,

vs.

GAY LIB, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Peeitioners herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, said judgment being entered June 8, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not presently reported, the opinion is set out in

the appendix, infra P.A-1. The order of the United States Court of Appeals for the Eighth Circuit denying Petitioners' petition for rehearing or hearing by court en banc, including the dissent thereto, entered on the 8th day of August, 1977, is set out in the appendix, infra P.A-24. The order modifying the opinion of the United States Court of Appeals for the Eighth Circuit, entered on the 8th day of August, 1977, is set out in the appendix, infra P.A-29. The order staying mandate of the United States Court of Appeals for the Eighth Circuit, entered on the 22nd day of August, 1977, is set out in the appendix, infra P.A-30. The findings and opinion of the United States District Court for the Western District of Missouri is reported in 416 F. Supp. 1350, and is set out in the appendix, infra, P.A-31.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 8, 1977. The petition for rehearing or hearing en banc was denied on August 8, 1977. The order modifying the opinion of the United States Court of Appeals for the Eighth Circuit was entered on the 8th day of August, 1977. The order staying the mandate was issued by the United States Court of Appeals for the Eighth Circuit on August 22, 1977. The jurisdiction of this court rests on 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is it an unconstitutional infringement of First Amendment rights for a public institution of higher education to deny formal recognition to a student organization supporting homosexuality where the recognized organization's activities, not philosophy, would likely, based upon expert medical testimony, result in the commission of felonious acts of sodomy?

2. Pursuant to the Federal Rules of Appellate Procedure and judicial precedent, is it proper for a Circuit Court of Appeals to substitute its discretion, judgment, conclusions and evidentiary findings for those of the governing board of a public institution of higher education and a Federal District Judge where the latter are supported by substantial evidence?

3. Does the recognizable interest of a student group supporting homosexuality outweigh the interest of the state of Missouri where formal recognition would likely bring about violation of the criminal law of the state of Missouri and likely cause students with latent homosexual tendencies to become overt homosexuals and deem homosexuality as normal behavior rather than to seek medical treatment for the medical illness of homosexuality?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the freedom of association clause of the First Amendment to the United States Constitution, said freedom of association clause being derived from the following portion of the First Amendment as follows: "Congress shall make no law abridging the freedom of speech, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

It also involves the privilege and immunities clause and the equal protection of the Fourteenth Amendment which states as follows: ". . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of the laws."

It also involves the clearly erroneous rule in Rule 52(a) of the Federal Rules of Civil Procedure which states in part, "In all actions tried upon the facts without a jury or with an ad-

visory jury, the court shall find the facts specially and state separately its conclusions of law thereon, . . . Findings of fact shall not be set aside unless clearly erroneous, . . ."

It also involves the sodomy statute of the State of Missouri, Section 563.230 R.S.Mo. 1969, which states, "Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary not less than two years."

STATEMENT OF THE CASE

The Petitioners are the named individual defendants who were the President and the members of the Board of Curators of "The Curators of the University of Missouri" which is the state university for the State of Missouri under Article IX, Section 9(a) of the Missouri Constitution, 1945. The University is governed by the Board of Curators which consist of nine members appointed by the governor of Missouri with the advice and consent of the Missouri Senate. (Although the University of Missouri was named as a defendant in this action, the District Court dismissed the action against the University because it was not a person under 42 U.S.C. 1983 (App. p. A-57) and no appeal was taken from this holding of the District Court.)

The Respondents are a student group called "Gay Lib" and individuals who were members of the executive board of Gay Lib. The Respondents were the Plaintiffs in District Court and the Appellants in the United States Court of Appeals for the Eighth Circuit. These students sought recognition as a student organization at the University of Missouri campus located at Columbia, Missouri. During this same period students on the University of Missouri campus located at Kansas City, Missouri, were seeking recognition for a student organization known as the "Gay People's Union".

The Respondents commenced on February 25, 1971 to obtain formal recognition of Gay Lib as a student organization on campus at Columbia, Missouri by submitting the required documents to the Missouri Students Association. The events and circumstances from that point to the final denial of recognition of Gay Lib by the Board of Curators of the University of Missouri are set forth in detail in the District Court's Findings and Opinion (App. p. A-31-44) and the Respondents in the statement of the case in their Appellant's Brief in the Court of Appeals adopted the "History and Facts of the Case" as set forth in the District Court Opinion (App. p. A-31-44).

When the appeal of the Respondents reached the Board of Curators, the Board had received an appeal from the Gay People's Union on the Kansas City, Missouri campus. These two appeals were consolidated by the Board of Curators and a hearing officer was appointed to hear the matter. The hearing officer, the Honorable Cullen Coil, proceeded to hold hearings at Columbia, Missouri on August 13, 1973 and at Kansas City, Missouri on August 15, 1973 (Exhibits A and B). Testimony was adduced under oath and a transcript was prepared of the proceedings. The hearing officer thereafter made recommended findings of fact to the Board of Curators.

As was noted by the District Court (App. p. A-41) there was a wide range of evidence presented by the University and Gay Lib by both lay and expert testimony going to three issues which were as follows:

(1) The procedural steps taken by Gay Lib to gain recognition at the University of Missouri at Columbia,

(2) whether homosexuality is normal or abnormal and

(3) whether University recognition of a homosexual organization would produce increased violations of the Missouri Sodomy Law.

After the Board of Curators had received the recommended findings of fact from the hearing officer and the transcript of the proceedings, the Board of Curators adopted a resolution denying the appeals of both Gay Lib from the Columbia campus and the Gay People's Union from the Kansas City campus (Exhibit I). This resolution is as follows:

"RESOLUTION"

"Be it hereby resolved that the Board of Curators of the University of Missouri concurs with and hereby adopts the Hearing Officer's Recommended Findings of Fact made by the Honorable Cullen Coil and further makes the following specific findings of fact:

1. The gay lib movement as exemplified by the Gay Lib Organization at UMC and the Gay People's Union at UMKC is premised upon homosexuality being normal behavior, contrary to the further findings herein.

2. A homosexual is one who seeks to satisfy his or her sexual desires with one of his own sex by practicing same or all of the following: fellatio, cunnilingus, masturbation, anal eroticism and perhaps in other ways.

3. Homosexuality is a compulsive type of behavior.

4. There are potential or latent homosexuals, i.e., persons who come into adolescence or young adulthood unaware that they have homosexual tendencies, but who have fears of sexual relations with a member of the opposite sex.

5. What happens to a latent or potential homosexual from the standpoint of his environment can cause him to become or not to become a homosexual.

6. That homosexuality is an illness and should and can be treated as such and is clearly abnormal behavior.

7. Certain homosexual practices violate provisions of Section 563.230 of the Revised Statutes of Missouri.

8. That formal recognition by the University of either or both the proposed Gay Lib and Gay People's Union will:

(1) give a formal status to and tend to reinforce the personal identities of the homosexual members of those organizations and will perpetuate and expand an abnormal way of life, unless, contrary to their intention as stated in their written purposes, the homosexual members make a concerted effort to seek treatment, recognize homosexuality as abnormal and attempt to cease their homosexual practices.

(2) tend to cause latent or potential homosexuals who become members of either proposed organization to become overt homosexuals.

(3) tend to expand homosexual behavior which will cause increased violations of Section 563.230 of the Revised Statutes of Missouri.

(4) be undesirable insofar as homosexuals will counsel other homosexuals, i.e., the sick and abnormal counseling others who are similarly ill and abnormal.

(5) constitute an implied approval by the University of the abnormal homosexual life-style as a normal way of life and would be so understood by many students and other members of the public, even though and despite the fact that, the University's regulations for student organizations provide that recognition of an organization by the University does not constitute approval or endorsement of the organization's aims or activities.

Therefore, based upon the Hearing Officer's Recommended Findings of Fact and the specific findings of fact set forth

above, The Board of Curators affirms the decision of President C. Brice Ratchford denying the appeals of the "Gay Lib Organization" at UMC and the "Gay People's Union" at UMKC.

The above set out resolution by the Board of Curators precipitated the filing of a complaint by the Respondents in the United States District Court for the Western District of Missouri, Central Division. Respondent's complaint asked for injunctive and declaratory relief seeking to invoke the jurisdiction of the federal district court by virtue of 28 U.S.C. 1343, 28 U.S.C. 2201, 28 U.S.C. 2202, 42 U.S.C. 1981, 42 U.S.C. 1983, 42 U.S.C. 1988 and the First and Fourteenth Amendments to the Constitution of the United States on the grounds that the denial of recognition of Gay Lib as a recognized student organization violated their freedom of speech, freedom of association, equal protection under the law and amounted to invidious discrimination under Sections 42 U.S.C. 1981, 1983 and 1988.

The jurisdiction in the court of first instance, the United States District Court for the Western District of Missouri, was based upon 28 U.S.C. 1343 and 42 U.S.C. 1983 as against the individually named defendants. (As previously noted the University of Missouri was dropped from the litigation as not being a person under 42 U.S.C. 1983). The District Court denied jurisdiction under all the other jurisdictional grounds alleged by the Respondents (App. pp. A-47-58).

The record in this case both in the District Court and the Eighth Circuit Court of Appeals consisted of the stipulation of the parties, the transcript of the hearing on the Columbia campus and the offered exhibits designated respectively as Exhibit A and Exhibits A(1) through A(25), the transcript of the hearing on the Kansas City campus and the offered exhibits designated respectively as Exhibit B and Exhibits A(1) through B(16), the deposition of Dr. Charles Socarides, M.D. taken on behalf of the Petitioners, and the depositions of Dr. Robert C. Kolodny, M.D.

and Dr. Marcel Saghir, M.D. taken on behalf of the Respondents.

On June 29, 1976, the District Court entered judgment for the Petitioners as to both claims asserted by Respondents on the ground that the University did not violate their freedom of association by denying recognition of Gay Lib in light of the evidence that such association is likely to incite, promote, and result in acts contrary to and in violation of the sodomy statutes of the State of Missouri and further that the Respondents were not denied equal protection since such an organization can not complain they have been treated differently from organizations that factually do not present such a clear and present danger of violation of the criminal laws of the state and that there was an appropriate government interest furthered by such different treatment (App. pp. A-31-69).

On June 8, 1977, an opinion was handed down by the three judge panel of the United States Court of Appeals for the Eighth Circuit reversing the judgment of the District Court. There was a concurring opinion by one of the judges and a dissenting opinion by the third judge. The opinion flatly rejected the application of the clearly erroneous rule to the District Court's findings of facts and further that even if such facts should be true that non-recognition of Gay Lib was overkill (App. pp. A-1-23).

Petitioners' request for a rehearing or hearing en banc was denied by an evenly divided court of the United States Court of Appeals for the Eighth Circuit on August 8, 1977 with a written dissent joined by two judges and concurring dissent by another judge (App. pp. A-24-28). On the same date an order was issued modifying the court's opinion filed on June 8, 1977 (App. p. A-29), by the deletion of two paragraphs in which the court discussed the expert testimony not noted by the District Court (App. p. A-11).

On August 22, 1977, the United States Court of Appeals for the Eighth Circuit issued its stay of mandate (App. p. A-30).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The United States Court of Appeals for the Eighth Circuit, in reversing the United States District Court for the Western District of Missouri, misconstrued the holding by the United States Supreme Court in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) when they stated that the testimony of Petitioners' psychiatrists stands on no different footing than the school authorities in Tinker, supra (App. p. A-12, Footnote 12). To use Tinker, supra, as precedent that expert testimony of the school authorities was ignored in a First Amendment case and therefore the Eighth Circuit Court of Appeals could ignore the expert testimony of Dr. Harold Voth, M.D., and Dr. Charles Socarides, M.D. just won't stand up when one reads the opinion in Tinker, supra. First, it should be pointed out that neither in the District Court opinion in Tinker (258 F.Supp. 971) nor in the Supreme Court opinion does it show that the school authorities were ever qualified as expert witnesses. Second the Supreme Court found in Tinker, supra, (l.c. 509) that the record failed to yield any evidence that the school authorities had any reason to anticipate any disruption and in fact footnote 3 in Tinker, this Court pointed out that the testimony of the school authorities was to the effect that it was not fear of disruption that motivated the regulation but the fact they simply felt that "the schools are not place for demonstrations".

The Eighth Circuit in reversing the District Court used an improper appellate review standard when it flatly refused to apply the clearly erroneous rule as set forth in Rule 52(a) of the Federal Rules of Civil Procedure to the findings of facts made by District Court that based upon expert medical testimony the recognition of Gay Lib would likely result in imminent violations of Missouri sodomy laws. In footnote 10 of the Eighth Circuit opinion (App. p. A-10), three reasons are advanced

for the inapplicability of Rule 52(a). As will be pointed out, all three reasons are invalid.

The first one was the fact that the evidence was submitted by deposition or in other documentary form with a citation to *Frito-Lay, Inc. v. So Good Potato Chip Co.*, 540 F.2d 927, 929-930 (8th Cir. 1976). The *Frito-Lay, Inc.* case does not support such a conclusion. In that case the court noted that the crucial finding of the trial court was not based upon expert testimony but rather upon the interpretation of a nonambiguous contract and observation of physical exhibits which were also viewed by the appellate court. This Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948) stated as follows, "In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable." A case more in point is *Skinner v. Parnell*, 257 F.2d 345, 346 (10th Cir., 1958) which held that Rule 52(a) applies to findings of facts based upon depositions. There does exist a conflict among the decisions of the various courts of appeal on the matter of whether or not the clearly erroneous rule is applicable where the evidence is documentary. These cases among the various circuit courts of appeal are set forth in an annotation in 11 A.L.R. Fed. 212 at pages 241-252.

The second reason advanced by the Eighth Circuit was that it has greater latitude in review of non-jury cases than it would in an appeal from a jury verdict. This statement is true but lacks any logic since the application of Rule 52(a) specifically relates to non-jury cases.

The third reason stated was the findings of fact were intertwined with legal consideration. This charge against the District Court is clearly unwarranted as the opinion of the District Court is a classical example of the mandated separation of the conclusions of law from the findings of facts required by a district court under Rule 52(a).

The rejection of the findings of facts made by the District Court without declaring them clearly erroneous resulted in a trial de novo by the Eighth Circuit Court of Appeals as was noted in the dissenting opinion of Judge Regan (App. p. A-22). The modification of the opinion in its order dated August 8, 1977 (App. p. A-29) deleting the two paragraphs which referred to "other pertinent expert testimony not expressly noted by the district court" (App. p. A-11) did not remove the taint of a trial de novo by the Eighth Circuit Court of Appeals.

The giving of mere lip service or the refusal to apply the clearly erroneous must be a major contributing factor to increases seen in the cases reported in Federal Reporter. The reason for the need of the clearly erroneous rule was superbly articulated by Judge Sanborn in *Pendergrass v. New Life Ins. Co.*, 181 F.2d 136. 138 (8th Cir. 1950), wherein he stated: "The entire responsibility for deciding doubtful fact questions in a non-jury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this court is the ultimate trier of fact issues in non-jury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases."

It is submitted that this is a proper case for the granting of certiorari because of the general importance of the matters involved. The issues concern the sensitive and grave ramifications of homosexuality in our society. There is clear and substantial evidence in this case that homosexual behavior is an illness and abnormal and that it is a compulsive type of behavior which results in lawless activities and that the act of recognition of student homosexual organizations will result in the increase of homosexual activities which are contrary to the sodomy law of the State of Missouri (App. p. A-61-64).

One only has to read the newspapers and view television to be aware of the serious concerns by society as reflected by the recent election in Dade County, Florida and the onset of litigation in this area. The findings of the hearing officer, the Honorable Cullen Coil, the resolution of the Board of Curators of the University of Missouri, the decision of the District Court and the dissenting opinions found in the Eighth Circuit opnion and its order denying a hearing en banc are all evidence of the concerns they had that this is a very serious matter and of general importance to society.

The opinion of the Eighth Circuit Court of Appeals in this case failed to perform the judicial function of balancing the interest of the state government against the competing constitutional rights of the Respondents. Instead they ignored the evidence in this case and based their opinion on the cases of Gay Students Org. of Univ. of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974), and Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976) (App. p. A-8-10).

In Gay Students Org. of Univ. of New Hampshire, supra, there was no expert medical testimony offered. In fact when the University of New Hampshire attempted to raise the issue that homosexuality was a mental disorder in a companion case in the state court of New Hampshire, the Supreme Court of New Hampshire held that such defense should have been raised in the case in the federal district court and since it was not, the federal suit was res judicata. See University of New Hampshire v. April, et al., 347 Atl. 2d 446, 450.

In Gay Alliance of Students, supra, there was no evidence presented to the governing body of Virginia Commonwealth University prior to the resolution of the governing body denying recognition of the Gay Alliance of Students as a recognized Student organization (l. c. 163). There was no evidence presented to district court other than a stipulation which purported to set forth the reasons for the denial of recognition by the governing

body and the Fourth Circuit Court of Appeals couldn't find the purported stipulation (l.c. 164 footnote 3).

Under the doctrine of Healy v. James, 408 U.S. 169 (1972) it is obvious that neither University in Gay Students Org. of Univ. of New Hampshire, supra, or Gay Alliance of Students, supra, presented the evidence to overcome the heavy burden to justify a denial of recognition which would result in a type of prior restraint of the right or association under the First Amendment.

In the instant case Petitioner did present expert medical testimony to meet the burden required by Healy v. James, supra. The Eighth Circuit Court of Appeals' labelling of this evidence as conclusory "inference" and "belief" for which no historical or empirical basis is disclosed (App. p. A-12) does not demonstrate the sensitive balancing of the rights to freedom of association against the state interest supporting its curtailment.

When the Petitioner refers to this sensitive balancing of rights as against state interest, the reference is to sensitive balancing shown by the United States Supreme Court in the areas of abortion and obscenity. This Court in Roe v. Wade, 410 U.S. 113 (1973), which was an abortion case raising the question of the right of privacy and due process, in order to arrive at the balance of the two conflict interest established a graduated test tied to the trimesters of a pregnancy. This Court in Miller v. California, 413 U.S. 15 (1973), which was an obscenity case raising First Amendment questions, in order to arrive at the balancing of the conflicting interests of freedom of speech as against the state interest of supporting its curtailment established the test that obscenity is to be judged by contemporary community standards (l.c. 32-43).

Petitioners submit that matters relating to homosexuality in the instant case are just as a sensitive area in society as the abortion and obscenity areas are and thus would be entitled to the same standard of judicial review.

CONCLUSION

It is respectfully requested that the Supreme Court grant certiorari in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 76-1656

Gay Lib; Lawrence A. Eggleston, individually and as an employee of the University of Missouri and as a member of the Executive Board of Gay Lib; Darrell Napton, individually and as a graduate student of the University of Missouri and as a member of the Executive Board of Gay Lib; Sarah MacNamara, individually and as an undergraduate student of the University of Missouri and as a member of the Executive Board of Gay Lib; and Doug Hudson, individually and as an undergraduate student of the University of Missouri and as a member of the Executive Board of Gay Lib,

Appellants,

v.

The University of Missouri, C. Brice Ratchford, individually and as President of the University of Missouri; Irwin Fane, Pleasant R. Smith, Mrs. William C. Tucker, Howard Woods, William C. Myers, Jr., William F. Thompson, John S. Williamson and Van O. Williams, individually and as members of the Board of Curators of the University of Missouri,

Appellees.

Appeal from the United States District Court for the Western District of Missouri

Submitted: February 17, 1977

Filed: June 8, 1977

Before Lay and Webster, Circuit Judges, and Regan,* District Judge.

Lay, Circuit Judge.

The issue before us is whether officials of a state university may lawfully withhold formal recognition of a student organization, comprised largely of homosexuals, whose basic purpose is to provide a forum for discussion about homosexuality. Gay Lib, an organization at the University of Missouri, and four of its members appeal from the denial of their request for injunctive relief by the United States District Court for the Western District of Missouri, the Honorable Elmo T. Hunter, presiding.[1] In denying the 42 U.S.C. § 1983 claim the district court sustained the University administration's refusal to recognize Gay Lib as a campus organization.[2] The court conceded that the question was a close one, but ruled that the school officials justified their action on the ground that recog-

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* The Honorable John K. Regan, United States District Judge for the Eastern District of Missouri, sitting by designation.

[1] The district court's opinion is reported at 416 F. Supp. 1350 (W.D. Mo. 1976).

[2] The appeal is brought against the individual members of the Board of Curators and the University President. The district court dismissed the action as to the University on the ground that the University or Board of Curators is not a "person" for purposes of 42 U.S.C. § 1983, relying on *Prostrollo v. University of South Dakota*, 507 F.2d 775 (8th Cir. 1974), *cert. denied*, 421 U.S. 952 (1975). *See City of Kenosha v. Bruno*, 412 U.S. 507 (1973). No appeal was taken from this ruling. We note that the Supreme Court has recently declined to decide the issue of whether a school district is a "person" for purposes of § 1983. *Mt. Healthy School Dist. v. Doyle*, 97 S.Ct. 568 (1977).

nition of Gay Lib would probably result in the commission of felonious acts of sodomy in violation of Missouri law.[3] The district court also rejected plaintiffs' claim that nonrecognition denied them equal protection of the laws.

On appeal, plaintiffs contend: (1) that the district court erred in holding that plaintiffs' First Amendment rights were not impermissibly infringed; and (2) that the action of the defendants deprived plaintiffs of equal protection of the law. We reverse.

Factual Background

Formal recognition of a student organization by the University of Missouri entitles the group to use campus facilities for meetings and to apply for financial support from student activities funds. Written University policies with respect to recognition of campus groups provide that:

> Groups are recognized on the basis of their own statements as to name, aims, nature and program. • • •
>
> Recognition of an organization by the Committee does not constitute approval or endorsement of the organization's aims and activities • • •.

Gay Lib began its efforts to gain formal recognition in early 1971. In accordance with established University procedures, the group submitted a petition for recognition to the Missouri Students Association (MSA). A statement of purposes accompanying the petition set forth the proposed organization's aims as follows:

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[3] Mo. Ann. Stat. § 563.230 (Vernon) provides:

> Every person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with mouth, shall be punished by imprisonment in the penitentiary not less than two years.

(a) To provide a dialogue between the homosexual and heterosexual members of the university community.

(b) To dispel the lack of information and develop an understanding of the homosexual at the University of Missouri.

(c) To alleviate the unnecessary burden of shame felt by the local homosexual population.

(d) To help education, the community and the homosexual to understand the social roles that the homosexual now plays in the community.

(e) To work closely with established university and community groups for a broader sharing of knowledge and information.

Both the MSA Rules Committee and the Senate approved Gay Lib's petition. The matter was then referred to the Committee on Student Organizations, Government and Activities (SOGA), which was comprised of students and faculty. While the matter was pending before SOGA, Gay Lib submitted a revised, more detailed statement of purposes.[4]

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[4] The revised statement provided:

1. Gay Lib intends to create a forum for the study of the sexual statutes of this state and especially of the sodomy law now in effect. Through study of the intent of the law and of its psychological and sociological implications, it will be possible to more fully understand what the full meaning is of being gay. Through knowledge of the law, it becomes possible to create an atmosphere within which the present statute may be revised or eliminated through an educational and candid look at all ramifications of such laws and their rationale. Changes of other such laws outside of Missouri and in nations such as Great Britain will provide a fuller context.

2. Gay Lib seeks to promote meaningful communication between all members of the University community, whether homosexual or heterosexual. With candor and compassion on both sides, much of the fear of the unknown can be eliminated tion is specifically intended to be two-way in nature. The gay and scars of past repression may be healed. This communica-

In December, 1971, SOGA voted to recommend recognition of Gay Lib. The recommendation, however, was vetoed by Edwin Hutchins, then Dean of Student Affairs. Hutchins based his veto on "a concern for the impact of recognition on the general relationship of the University to the public at large."[5]

Gay Lib appealed the nonrecognition decision to successive levels of the University heirarchy, ending with the President of the University. Each level sustained Hutchins' ruling.[6] Thereafter, Gay Lib appealed the decision to the University's Board of Curators. The Board consolidated the appeal with a related matter arising out of the University of Missouri at Kansas City,

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world has just as much to learn from the straight world as they have to offer it. We seek to develop an atmosphere in which people are themselves first and sexual entities second.

3. Gay Lib wants to provide information to the vast majority of those who really don't know what homosexuality or bisexuality behavior is. Too much of the same prejudice is now directed at gay people just as it is directed at ethnic minorities.

4. Gay Lib does not seek to proselytize, convert, or recruit. On the other hand, people who have already established a pattern of homosexuality when they enter college must adjust to this fact.

5. Gay Lib hopes to help the gay community to rid itself of its subconscious burden of guilt. Society imprints this self-image on homosexuals and makes adjustment with the straight world more difficult.

6. Gay Lib hopes to function as a channel for those who find difficulty in sexual adjustment. While we do not pretend to have psychiatric expertise, we can reach people who do not trust normal channels for such help and enable them to contact professional help as required.

7. As an educational group, Gay Lib does not advocate any violation of state statutes. We serve as a forum for understanding and knowledge where this is now lacking.

[5] Hutchins' reasons for the veto were set forth in a lengthy letter addressed to Dr. Ray Lansford, the SOGA chairman. The letter is reproduced in full in the district court's opinion, 416 F. Supp. at 1355-57.

[6] The circumstances of the administrative appeals are detailed in the district court's opinion, 416 F. Supp. at 1357-58.

and appointed a hearing officer, Cullen Coil, a Jefferson City attorney and former Commissioner of the Missouri Supreme Court, to develop the facts. At the hearings substantial lay and expert testimony was adduced. Following the hearings, Coil recommended that the University deny formal recognition to the organization.[7] Subsequently, the Board denied Gay Lib's appeal, adopting the following resolution:

> Be it hereby resolved that the Board of Curators of the University of Missouri concurs with and hereby adopts the Hearing Officers' Recommended Findings of Fact made by the Honorable Cullen Coil and further makes the following specific findings of fact:
>
> 1. The gay lib movement as exemplified by the Gay Lib Organization at UMC and the Gay People's Union at UMKC is premised upon homosexuality being normal behavior, contrary to the further findings herein.

[7] Coil found that formal recognition of Gay Lib would:

(1) give a formal status to and tend to reinforce the personal identities of the homosexual members of those organizations and will perpetuate and expand an abnormal way of life, unless contrary to their intention as stated in their written purposes, the homosexual members make a concerted effort to seek treatment, recognize homosexuality as abnormal and attempt to cease their homosexual practices;

(2) tend to cause latent or potential homosexuals who become members to become overt homosexuals;

(3) tend to expand homosexual behavior which will cause increased violations of section 563.230 of the Revised Statutes of Missouri;

(4) be undesirable insofar as homosexuals will counsel other homosexuals, i.e., the sick and abnormal counseling others who are similarly ill and abnormal; and

(5) constitute an implied approval by the University of the abnormal homosexual life-style as a normal way of life and would be so understood by many students and other members of the public, even though, and despite the fact that, the University's regulations for student organizations provide that recognition of an organization by the University does not constitute approval or endorsement of the organization's aims or activities.

> 2. A homosexual is one who seeks to satisfy his or her sexual desires by practicing some or all of the following: fellatio, cunnilingus, masturbation, anal eroticism and perhaps in other ways.
>
> 3. Homosexuality is a compulsive type of behavior.
>
> 4. There are potential or latent homosexuals, i.e. persons who come into adolescence or young adulthood unaware that they have homosexual tendencies, but who have fears of sexual relations with a member of the opposite sex.
>
> 5. What happens to a latent or potential homosexual from the standpoint of his environment can cause him to become or not to become a homosexual.
>
> 6. That homosexuality is an illness and should and can be treated as such and is clearly abnormal behavior.
>
> 7. Certain homosexual practices violate provisions of Section 563.230 of the Revised Statutes of Missouri.
>
> 8. That formal recognition by the University of either or both the proposed Gay Lib and Gay People's Union will: (The Board of Curators here adopted verbatim Mr. Coil's above-cited conclusions as to the effect of formal recognition.)

Plaintiff filed this civil rights action to compel the University to formally recognize Gay Lib, alleging that non-recognition infringed their First Amendment freedom of association and denied them equal protection. By stipulation of the parties, the transcript of the hearings held at the direction of the Board of Curators, as well as the exhibits introduced at those proceedings, were admitted into evidence. The district court also received depositions of three medical doctors taken by the parties. No other evidence was presented.

First Amendment

Although the district court denied plaintiffs relief, Judge Hunter, recognizing *Healy v. James*, 408 U.S. 169 (1972), stated:

> [T]he University, acting here as an instrumentality of the State, has no right to restrict speech or association "simply because it finds the views expressed to be abhorrent."

416 F. Supp. at 1370, quoting *Healy, supra* at 187.[8]

Since the Supreme Court's decision in *Healy*, the First and Fourth Circuits have sustained the rights of groups similar to Gay Lib to sponsor social functions involving the use of university facilities, *Gay Students Org. of Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); and to register as a student organization. *Gay Alliance of Students v. Matthews*,

[8] In *Healy v. James*, 408 U.S. 169 (1972), the Supreme Court held that students at Central Connecticut State College had a right to form a local chapter of Students for a Democratic Society and have the group recognized as a campus organization, absent a showing that the group advocated imminent lawless action and that it was likely to incite or produce such action, that the group materially and substantially disrupted the work and discipline of the school, or that it would fail to abide by reasonable campus rules and regulations. The Court rejected the college president's disagreement with the group's philosophy as an acceptble basis for withholding recognition:

> The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.

408 U.S. at 187-88.

The Court remanded the case to the district court for further consideration as to whether the organization pledged to abide by reasonable campus rules and regulations.

544 F.2d 162 (4th Cir. 1976). The analytical discussion offered by these two courts strongly supports recognition of Gay Lib here.[9]

Notwithstanding these decisions, defendants assert that the record in this case contains expert medical testimony which provides a legal justification for withholding formal recognition from Gay Lib. They argue, and the district court found, that

[9] As Judge Winter of the Fourth Circuit observes:

> If the University is attempting to prevent homosexuals from meeting one another to discuss their common problems and possible solutions to those problems, then its purpose is clearly inimical to basic first amendment values. Individuals of whatever sexual persuasion have the fundament right to meet, discuss current problems, and to advocate changes in the status quo, so long as there is no "incitement to imminent lawless action." [Citation omitted.]
>
> If, on the other hand, VCU's concern is with a possible rise in the incidence of actual homosexual conduct between students, then a different problem is presented. We have little doubt that the University could constitutionally regulate such conduct. [Citations omitted.] Additionally, it may regulate any conduct (homosexual or otherwise) which "materially and substantially disrupt[s] the work and discipline of the school." [Citation omitted.] But denial of registration is overkill.
>
> "[T]he critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." [Citation omitted.] There is no evidence that GAS is an organization devoted to carrying out illegal, specifically proscribed sexual practices. While Virginia law proscribes the practice of certain forms of homosexuality, Va.Code § 18.2-361, Virginia law does not make it a crime to *be* a homosexual. Indeed, a statute criminalizing such status and prescribing punishment therefor would be invalid. [Citation omitted.]
>
> It follows that even if affording GAS registration does increase the opportunity for homosexual contacts, that fact is insufficient to overcome the associational rights of members of GAS. Given the right to exclude individuals who are convicted of practicing proscribed forms of homosexuality, or whose homosexual conduct, although not proscribed, materially and substantially disrupts the work and discipline at VCU, the suppression of associational rights because the opportunity for

recognition of Gay Lib would likely result in imminent violations of Missouri sodomy laws.[10]

The district court placed reliance on the testimony of two psychiatrists, Dr. Harold Voth and Dr. Charles Socarides. Dr. Voth testified that formal recognition would tend to "perpetuate" or "expand" homosexual behavior. However, on cross-examination, Dr. Voth further testified that his conclusion was "an inference," and "[t]here is no way in the world for me or anyone else to know." Dr. Socarides stated that he believed "that wherever you have a convocation of homosexuals, that you are going to have increased homosexual activities which, of course, includes sodomy." He concluded that "any gathering would certainly promote such sexual contact."

Also relevant to the district court's determination was the medical opinion proffered by defendants' experts that homosexual behavior is compulsive. However, as demonstrated by the substantial body of professional medical opinion conflicting with defendants' case, it must be acknowledged that there is no scientific certitude to the opinions offered.[11]

The district court noted testimony from Dr. Robert Kolodny, a medical doctor with some training in psychiatry. Dr. Kolodny testified that he believed recognition would not have "any discernible effect upon the sexual behavior of the student population." He based his conclusion on his clinical knowledge of human sexual behavior and "from actual knowledge of what, in fact has occurred on several campuses where homosexual groups have been allowed to acquire office space, hold social functions, and sponsor university activities."

Our review of the record discloses other pertinent expert testimony not expressly noted by the district court. Dr. Sidney Stahl, an assistant professor of psychology, testified that he did not believe that the existence of a Gay Lib group would increase actual homosexual behavior. In response to the question of whether the existence of such a group would increase the incidence of homosexuality on campus Dr. Fred McKinney, a professor of psychology, testified:

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homosexual contacts is increased constitutes prohibited overbreadth. [Citations omitted.]

Gay Alliance of Students v. Matthews, 544 F.2d 162, 166 (4th Cir. 1976).

Chief Judge Coffin similarly wrote for the First Circuit:

> Another interest asserted by appellants is that in preventing illegal activity, which may include "deviate" sex acts, "lascivious carriage", and breach of the peace. . . . Mere "undifferentiated fear or apprehension" of illegal conduct, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. at 508, 89 S.Ct. 733, is not enough to overcome First Amendment rights and speculation that individuals might at some time engage in illegal activity is insufficient to justify regulation by the state.

Gay Students Org. of Univ. of New Hampshire v. Bonner, 509 F. 2d 652, 661-63 (1st Cir. 1974).

[10] Defendants urge that his court must apply the clearly erroneous rule and sustain the district court's credibility assessment of conflicting testimony in view of the fact that there is substantial evidence supporting the court's finding. We reject this approach for several reasons. First, this court is not bound by the district court's credibility evaluation of witnesses where the evidence is submitted by deposition or in other documentary form. *See Frito-Lay, Inc. v. So Good Potato Chip Co.*, 540 F.2d 927, 929-30 (8th Cir. 1976). Second, even under the clearly erroneous rule, this court has a greater latitude of review than it would in an appeal from a jury verdict. "In the latter it is a question of substantial evidence. In the former, there is still the qualitative factor of the truth and right of the case—the impression that a fundamentally wrong result has been reached." *Oil Screw Noah's Ark v. Bentley & Felton Corp.*, 322 F. 2d 3, 5-6 (5th Cir. 1963). *See also United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Finally, the critical question is not purely factual, but rather is closely intertwined with legal considerations. The inquiry is not merely whether certain events will occur, but rather, whether imminent lawless activity is so likely as to warrant infringement of First Amendment rights.

[11] Of further significance is the fact that recognition of Gay Lib is not determinative of whether its members will be allowed to meet or associate, but only of whether the group may use school facilities and become eligible for student activities funds.

> As a rule, a rational group approach to something doesn't do that. In the case of alcoholism, it has the opposite effect. Now, I'm not saying that it wouldn't. I think that is an empirical question. I think there are groups on other campuses and it could be studied. Homosexuality is increasing and there are a lot of ways a homosexual can meet other homosexuals besides in a room in the University where they are discussing the problems of homosexuality and the social problems.

Certain lay testimony is also relevant. Lawrence Eggleston, a member of the Gay Lib executive board and a plaintiff in this case, testified that he did not intend to make Gay Lib a social organization or use it as a means of meeting other homosexuals.

Defendants urge that their experts are more worthy of belief because of their outstanding professional credentials. We need not pause here since defendants' evidence turns solely on Dr. Voth's conclusory "inference" and Dr. Socarides' "belief," for which no historical or empirical basis is disclosed.

Even accepting the opinions of defendants' experts at face value, we find it insufficient to justify a governmental prior restraint on the right of a group of students to associate for the purposes avowed in their statement and revised statement of purposes.[12] While it is difficult to articulate generalized stand-

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[12] In one sense, although acknowledging the outstanding professional credentials of defendants' psychiatrists, their combined testimony stands on no different footing than the school authorities in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), who were most knowledgeable on the pattern of student behavior in school, and who testified that in their opinion schools were no place for demonstrations. Yet the Supreme Court observed:

> The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturb-

ards as to the quantum and quality of proof necessary to justify the abridgment of First Amendment rights,[13] the many Supreme Court cases dealing with prior restraints[14] and other First

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> ance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

393 U.S. at 508-09.

[13] The Supreme Court has variously defined the nature of the requisite showing as follows. In *Schenck v. United States*, 249 U.S. 47, 52 (1919), Mr. Justice Holmes, writing for the Court, stated:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

In *Dennis v. United States*, 341 U.S. 494, 510 (1951), the Court adopted Judge Learned Hand's statement that:

> In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.

In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the Court stated:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

[14] The Supreme Court has long adhered to the principle that any system of prior restraint of expression bears a heavy presumption against its constitutional validity. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Heller v. New York*, 413 U.S. 483, 491-92 (1973); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *Ban-*

Amendment issues[15] make clear that the restriction of First Amendment rights in the present context may be justified only by a far greater showing of a likelihood of imminent lawless action than that presented here.

Mr. Justice Harlan, in delivering the opinion of the Supreme Court in *NAACP v. Alabama*, 357 U.S. 449 (1958), emphasized the importance of freedom to engage in association:

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tam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Near v. Minnesota*, 283 U.S. 697 (1931). In *Southeastern Promotions, Ltd. v. Conrad, supra*, the Court further stated that: "The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." 420 U.S. at 558-59.

[15] The numerous decisions in which the Supreme Court has found an insufficient basis for abridging First Amendment rights in a variety of contexts are instructive of the heavy burden which defendants must satisfy here. *See Hess v. Indiana*, 414 U.S. 105 (1973) (words advocating illegal action at some indefinite future time or having only a tendency to lead to violence insufficient); *Cohen v. California*, 403 U.S. 15 (1971) (fear of violent public reaction to wearing of jacket bearing profane epithet on the draft insufficient); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (mere public intolerance of animosity insufficient); *Street v. New York*, 394 U.S. 576 (1969) (words not so inherently inflammatory as to come within "fighting words" doctrine insufficient); *Cox v. Louisiana*, 397 U.S. 536 (1965) (hostility to assertion or exercise of constitutional rights insufficient); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (stirring people to anger, inviting public dispute or bringing about condition of unrest insufficient); *Bridges v. California*, 314 U.S. 252 (1941) (interference with fair administration of justice not sufficiently likely); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (insufficient showing of clear and present menace to public peace and order). *Compare Carroll v. Princess Anne*, 393 U.S. 175 (1968) (speech interlaced with burgeoning violence may be sufficient); *Scales v. United States*, 367 U.S. 203 (1961) (teaching of forceful overthrow of government accompanied by directions as to type of illegal action to be taken or by conduct to render later illegal activity effective sufficient); *Feiner v. New York*, 340 U.S. 315 (1951) (clear danger of disorder sufficient); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)(insulting or "fighting" words which by their very utterance inflict injury or tend to incite immediate breach of peace sufficient.)

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. [Citations omitted.] It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. [Citations omitted.] Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

357 U.S. at 460-61.

In the present case, none of the purposes or aims of Gay Lib, at least in this record, evidence advocacy of present violations of state law[16] or of university rules or regulations, and the

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[16] Surely, it is no longer a valid argument to suggest that an organization cannot be formed to peaceably advocate repeal of certain criminal laws. *See Street v. New York*, 394 U.S. 576, 591 (1969).

Chief Judge Markey of the Court of Customs and Patent Appeals, sitting by designation, concurred in Judge Winter's analysis in *Gay Alliance of Students v. Matthews, supra*, and cogently added:

> Consistent with the present decision, associations advocating any idea, any change in the law or policy of the general society, are as fully entitled to registration as is the plaintiff. Thus, associations devoted to peaceful advocacy of decriminilization or social acceptance of sadism, euthanasia, masochism, murder, genocide, segregation, master-race theories, gambling, voodoo, and the abolishment of all higher education, to list a few, must be granted registration, upon proper application and indicated compliance with reasonable regulations, if VCU continues to "register" associations.
>
> . . . .
>
> It is of no moment, in First Amendment jurisprudence, that ideas advocated by an association may to some or most of us

district court made no finding of such advocacy. The district court further made no finding that Gay Lib would "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." *Healy v. James, supra,* at 189. So far as the avowed purposes and aims of this association are concerned, in the words of the Fourth Circuit:

> [I]t is, at most, a "pro-homosexual" political organization advocating a liberalization of legal restrictions against the practice of homosexuality and one seeking, by the educational and informational process, to generate understanding and acceptance of individuals whose sexual orientation is wholly or partly homosexual.

Gay Alliance of Students v. Matthews, supra, at 164.
It is difficult to singularly ascribe evil connotations to the group simply because they are homosexuals. *See Gay Alliance of Students v. Matthews, supra; Gay Students Org. of Univ. of New Hampshire v. Bonner, supra.* An interesting fact is that not all members of the group are homosexuals.[17] Furthermore, this approach blurs the constitutional line between mere advocacy and advocacy directed to inciting or producing imminent lawless action. Finally, such an approach smacks of penalizing

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> be abhorrent, even sickening. The stifling of advocacy is even more abhorrent, even more sickening. It rings the death knell of a free society. Once used to stifle "the thought that we hate," in Holmes' phrase, it can stifle ideas we love. It signals a lack of faith in people, in its supposition that they are unable to choose in the market place of ideas.

544 F.2d at 167-68.

[17] Would defendants allow a group of heterosexual students to meet to discuss problems of homosexuals and the repeal of the sodomy laws? Presumably so, since there would be no basis to "infer" that the compulsive behavior of the students would incite violations of the law. However, assuming this to be so, it is obvious that equal protection principles become more sharply focused. *See Gay Alliance of Studentsv. Matthews, supra.*

persons for their status rather than their conduct, which is constitutionally impermissible. *See Robinson v. California,* 370 U.S. 660 (1962).

We, of course, acknowledge the statement in *Tinker v. Des Moines Indep. Community School Dist.,* 393 U.S. 503, 506 (1969), repeated in *Healy v. James, supra,* at 180, that the factual circumstances must be evaluated in light of the "special characteristics" of the school environment. In this sense, it is clear that a university has residual power "to assure that the traditional academic atmosphere is safeguarded," and to promulgate reasonable rules and regulations. *Healy, supra,* at 194 n. 24. It may be, as Mr. Justice Rehnquist observed in his concurring opinion in *Healy,* that the "school administrator may impose upon . . . students reasonable regulation that would be impermissible if imposed by the government upon all citizens." 408 U.S. at 203. We note, however, that the interest asserted by defendants in justification for the abridgement of plaintiffs' First Amendment rights is not peculiar to the academic environment. Moreover, it is also axiomatic that the First Amendment must flourish as much in the academic setting as anywhere else. *See Papish v. University of Missouri Curators,* 410 U.S. 667, 671 (1973); *Shelton v. Tucker,* 364 U.S. 479, 487 (1960). To invoke censorship in an academic environment is hardly the recognition of a healthy democratic society.

Attorneys' Fees.

Plaintiffs also seek an award of attorneys' fees, to be assessed against the defendants as cost, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559 (Oct. 19, 1976), 90 Stat. 2641, 42 U.S.C.A. § 1988 (Dec. 1976 Supp.), which provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981 to 1983, 1985, and 1986 of this title * * * the

court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Act did not become effective until October 19, 1976, subsequent to the conclusion of the district court proceedings; however, we have held that the Act may be applied retroactively in cases in which an appeal was pending on the effective date of the Act. **Finney v. Hutto,** 548 F.2d 740, 742 (8th Cir. 1977). We feel that this is an appropriate case for an award of attorneys' fees. Accordingly, we award plaintiffs' attorneys ' fees for the appellate portion of this litigation in the sum of $1,000. We remand the cause to the district court for the determination and entry of an award of reasonable attorneys' fees for the district court phase of this case. *See Doe v. Poelker,* 515 F.2d 541, 548 (8th Cir. 1975), *cert. granted,* 96 S.Ct. 3220 (1976).

Conclusion.

We hold that the defendants' refusal to recognize Gay Lib as a campus organization denied plaintiffs their First Amendment rights.[18] The judgment of the district court is reversed and the cause remanded for the entry of appropriate injunctive relief and an award of attorneys' fees.

WEBSTER, J., concurring.

I join in the court's opinion. Of particular significance to me is the prior restraint of First Amendment rights on such skimpy and speculative evidence as appellees advanced below. There is absolutely no evidence that appellants intend to violate any state law or regulation of the university or even that they will advocate such violations. Until such time as imminent overt

[18] In view of our holding, we need not consider plaintiffs' equal protection claim.

lawless activity can be shown, the organization may not be excluded from recognition if it is otherwise in compliance with university regulations. *Healy v. James,* 408 U.S. 169 (1972).

I have no doubt that the ancient halls of higher learning at Columbia will survive even the most offensive verbal assaults upon traditional moral values; solutions to tough problems are not found in repression of ideas. I am equally certain that the university possesses the power and the right to deal with individuals and organizations, "recognized" or not, that violate either its lawful regulations or the laws of the state. There will be time for that if appellees' dire predictions should somehow prove to be correct. The nature of our government demands that we abide that time.

REGAN, dissenting.

I respectfully dissent.

I recognize, as did the District Court, that the denial of official recognition to a college organization is a form of prior restraint of the First Amendment of right of association, as held in *Healey v. James,* 408 U.S. 169. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces free speech," *NAACP v. Alabama,* 357 U.S. 449, 460. And as the Supreme Court stated in the last cited case, "Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state actions which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

Having said this, I am nevertheless convinced, after a careful study of the record, that the District Court correctly held

that the evidence amply justified the considered decision of the University officials to deny recognition to Gay Lib.

What *Healey v. James* held was that "denial of official recognition, *without justification*, to college organizations burdens or abridges the right of individuals to associate to further their personal beliefs." *Healey* involved a "left wing" group (Students for a Democratic Society) which sought recognition at a time when "[t]here had been widespread civil disobedience on some [college] campuses, accompanied by the seizure of buildings, vandalism and arson," with respect to which "SDS chapters on some of these campuses had been a catalytic force during this period." However, inasmuch as there was a total absence of any evidence that the organization seeking recognition itself actually "posed a substantial threat" that it would constitute a disruptive force on campus, there was, on the record, "no justification" for denying recognition to that group.

I do not read *Healey* as mandating that in *every* case involving non-recognition of a campus group a showing of the certitude of imminent overt lawless or disruptive activity must be made. Rather, the issue is whether, under the circumstances, *justification* of the appropriateness of denial of recognition has sufficiently been shown.

The credible testimony of highly qualified psychiatrists persuasively demonstrates to me, as it did to the District Court, that homosexual behavior is compulsive and that homosexuality is an illness and clearly abnormal. In view of the expert testimony which in my view is neither "skimpy [nor] speculative," defendants were warranted in concluding that formal recognition of Gay Lib would tend to expand homosexual behavior and activity on campus and likely result in felonious acts of sodomy proscribed by Missouri law. As the District Court stated: "The legitimate interest of the University as a state institution includes the right to refuse the requested recognition and its con-

comitants where the result predictably is to bring on the commission of crimes against the sodomy statutes of the State of Missouri."

With all due respect to the majority, I do not agree that the combined testimony of the psychiatrists testifying for the defendants stands on no different footing than that of the school principal in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In light of the admittedly "outstanding professional credentials" of the psychiatrists, they were eminently qualified by training and experience to express expert opinions on the subject of homosexuality and the effect of recognition of Gay Lib by the University.

As for *Tinker*, it held only that individuals had the right to wear black armbands as a silent, passive expression of their disapproval of this country's Viet Nam policy. Such a purely symbolic act was "unaccompanied by any disorder or disturbance" on their part or any "interference, actual or nascent, with the schools' work or . . . collision with the rights of other students to be secure and to be let alone." The case was not ruled in the context of group action. It involved only the school authorities' disagreement with the *philosophy* being expressed by the wearers of the black armbands. It is totally unlike the situation here present. Here, the officials' denial of recognition to Gay Lib was not based on "mere disagreement" with the group's "philosophy."

Moreover, state university officials have a responsibility not only to taxpayers but to *all* students on campus, and that responsibility encompasses a right to protect latent or potential homosexuals from becoming overt homosexual students. In carrying out these responsibilities, they were aware that unlike recognition of political associations, whether of the right, center or left, an organization dedicated to the furtherance and advancement of homosexuality would, in any realistic sense, cer-

tainly so to impressionistic students, imply approval not only of the organization per se but of homosexuality and the normality of such conduct, and thus adversely affect potential homosexual students. In my opinion, the University was entitled to protect itself and the other students on campus, in this small way, against abnormality, illness and compulsive conduct of the kind here described in the evidence.

Finally, I do not agree that the "clearly erroneous" rule may be rejected in this case. The mere fact that the testimony was submitted to the district court in deposition and transcript form does not justify a completely de novo approach by this Court. *See Frank Adam Electric Co. v. Colt's Patent Fire Arms Mfg. Co.*, 148 F.2d 497, 499 (8th Cir. 1945), holding, per Judge Sanborn,

> While the Special Master, who tried this case upon the written transcript taken before Judge Davis [who subsequently died], had no better opportunity to weigh the evidence that we have, this court will not try the case de novo. The findings of fact of the Special Master, which have been approved by the District Court, are conclusive upon this court *in so far as they are not clearly erroneous*.

The case of *Frito-Lay, Inc. v. So Good Potato Chip Co.*, 540 F.2d 927, cited by the majority, does not involve a comparable situation. Judge Webster, after noting that there was *no dispute* as to the evidence and that *no credibility issues* were before this Court, pointed out that the crucial finding of the trial court was not based on expert testimony but rather upon that court's interpretation of a non-ambiguous contract and his personal observation of physical exhibits which this Court also viewed. Even so, Judge Webster was careful to make clear that "(t)he factual determinations underlying the issue of 'similarity' remain subject to the clearly erroneous standard of review."

The other cases cited by the majority, *Oil Screw Noah's Ark. v. Bentley & Felton Corp.*, 322 F.2d 3, and *United States v.*

United States Gypsum Co., 333 U.S. 364, are equally inapposite. They recognize the force of the clearly erroneous rule which authorizes the reversal of a district court's findings only if the reviewing court has the "firm conviction that a mistake has been made," or, as the rule is stated in *Oil Screw Noah's Ark*, the definite feeling that "a fundamentally wrong result has been reached."

I am firmly of the view that Rule 52, FRCP, which mandates that the district court's "(f)indings of fact shall not be set aside unless clearly erroneous," precludes reversal in this case. Granted that the trial court had no better opportunity than this panel to judge the credibility of the witnesses, a factor which may not be ignored, nevertheless, the plain language of the Rule makes the clearly erroneous principle here applicable. And since I do not have a firm conviction that the trial court reached a fundamentally wrong result, I would affirm.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 76-1656

Gay Lib, et al.,
Appellants,
v.
The University of Missouri, et al.,
Appellees.

On Petition for Rehearing En Banc

Filed: August 8, 1977

The petition for rehearing en banc is denied by an evenly divided court.

Chief Judge Gibson, joined by Judge Henley, files the following statement in regard to the denial of the petition for rehearing en banc:

GIBSON, Chief Judge.

I dissent from the denial of the petition for rehearing en banc. In my opinion, Fed. R. Civ. P. 52 has been misapplied in this case and the District Court's findings of fact, which are supported by the record, have been improperly displaced by appellate findings of fact.

The divided panel opinion seems to hold that the "clearly erroneous" standard of Rule 52 does not apply to this case. *See ante* n. 10. This approach misconceives the reach of Rule 52 and ignores the traditional rule that appellate courts do not review a trial judge's factual findings *de novo*. Even where the evidence at trial consists solely of depositions and other documentary evidence, the appellate court must respect the trial judge's credibility evaluation and adopt his findings unless they are clearly erroneous. *Merrill Trust Company v. Bradford*, 507 F.2d 467 (5th Cir. 1974); *Aetna Casualty and Surety Co. v. Hunt*, 486 F.2d 81 (10th Cir. 1973); *Volkswagen of America, Inc. v. Jahre*, 472 F.2d 557 (5th Cir. 1973); *Frank Adam Electric Co. v. Colt's Patent Fire Arms Mfg. Co.*, 148 F.2d 497 (8th Cir. 1945).

The District Court, accepting the testimony of two highly qualified psychiatrists, found that recognition of Gay Lib would likely result in imminent violations of the Missouri sodomy laws. To rebut this expert psychiatric testimony, Gay Lib relies on the testimony of a medical doctor who is not a psychiatrist; an assistant professor of psychology who stated that he had not undertaken any in-depth research into the etiologies of homosexuality, but "doubt[ed]" that recognition of Gay Lib would increase actual homosexual behavior; and a professor of psychology who admitted in his testimony that "I'm not saying that the existence of such a [homosexual] group wouldn't" increase the incidence of homosexuality on the campus.

The District Court, confronted with this conflicting testimony, accepted the testimony of the psychiatric experts rather than the above testimony of non-psychiatrists. Lacking training in the psychiatric discipline, appellate judges are ill-prepared to conclude that these expert psychiatric opinions lack an historical or empirical basis. Maybe an appellate court, reviewing this case *de novo*, would have made a finding different than the District Court's. But our review is not so un-

bridled that we can reject the District Court's findings on that basis. "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 495 (1950). Our review is circumscribed by the clearly erroneous standard, which allows us to reject a finding of the District Court only if we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). I find adequate evidentiary support for the District Court's findings and would not disturb them.

Given the finding that recognition of Gay Lib would likely result in imminent violations of Missouri sodomy laws, there is no prior restraint issue in this case. There is "little doubt that the University could constitutionally regulate such conduct," *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976), and the First Amendment does not require a University to extend formal recognition to a campus organization that will engage in criminal activity, *Healy v. James*, 408 U.S. 169, 188-89 (1972). Citizens possess no First Amendment right to engage in illegal activity and, in light of the District Court's findings, the University officials' actions did not constitute an impermissible prior restraint.

This case involves the sensitive and polemical issue of homosexual rights, an issue which has spawned nationwide debate and attention. The limited question here is whether a homosexual group has a First Amendment right to be recognized by a university and thus to be entitled to use school facilities and to be eligible for student activities funds. These First Amendment arguments must be considered in light of the special characteristics and interests of an educational institution. *Healy v. James*, 408 U.S. 169, 180 (1972). These institutions

are populated by young, often impressionable students; school officials have a responsibility to shield these students from exposure to probable illegal conduct on the campus. Missouri law has criminalized sodomy and the District Court found that recognition of Gay Lib would result in imminent violations of that law. Under these circumstances, it was permissible for school officials to withhold recognition of Gay Lib. Requiring the school to recognize Gay Lib places school officials in the unseemly position of officially sanctioning this conduct and making school funds and facilities available for the use of a homosexual organization, whose members will likely engage in criminal activity, a situation not mandated by the First Amendment.

This is yet another example of unwarranted judicial intrusion into the internal operations of an educational institution. School officials are charged with the responsibility of making and implementing policy decisions. Before deciding not to recognize Gay Lib, the Board of Curators appointed a hearing officer, who heard substantial lay and expert testimony on this issue. His recommendation that the school not recognize Gay Lib was adopted by the Board of Curators. I would defer to the policy decisions of school administrators, who are more attuned to the interests of the students and the school than we are. We are not school administrators and have no authority to dictate school policy unless there is a clear showing of a constitutional violation. I find no such violation here. I am in accord with Judge Regan's dissenting opinion and would affirm the District Court's Judgment.

STEPHENSON, Circuit Judge.

I concur in Chief Judge Gibson's dissent from the denial of the petition for rehearing en banc with the reservation that it is my view that this court is not bound by the District Court's

credibility evaluation of witnesses where the evidence is submitted by deposition or in other documentary form.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

September Term, 1976

No. 76-1656

Gay Lib, et al., Appellants, vs. The University of Missouri, et al., Appellees.	Appeal from the United States District Court for the Western District of Missouri.

It is now here ordered by this Court that the second and third paragraphs appearing on page 13 of this Court's opinion filed on June 8, 1977, beginning with the words "Our review of" and ending with the word "homosexuals" are hereby deleted.

August 8, 1977

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

September Term, 1976

No. 76-1656

Gay Lib, et al.,
Appellants,

vs.

The University of Missouri, et al.,
Appellees.

On motion of Appellees, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 22, 1977

APPENDIX E

In the United States District Court for the Western
District of Missouri, Central Division

Gay Lib; Lawrence A. Eggleston, Individually and as an Employee of the University of Missouri and as a Member of the Executive Board of Gay Lib; Darrell Napton, Individually and as a Graduate Student of the University of Missouri and as a Member of the Executive Board of Gay Lib, Sarah MacNamara, Individually and as an Undergraduate Student of the University of Missouri and as a Member of the Executive Board of Gay Lib, and Doug Hudson, Individually and as an Undergraduate Student of the University of Missouri and as a Member of the Executive Board of Gay Lib, Plaintiffs,

vs.

The University of Missouri, C. Brice Ratchford, Individually and as President of the University of Missouri; Irwin Fane, Pleasant R. Smith, Mrs. William C. Tucker, Howard Woods, William C. Myers, Jr., William F. Thompson, John S. Williamson, and Van O. Williams, Individually and as Members of the Board of Curators of the University of Missouri,
Defendants.

Civil Action.
No. 74 CV 53-C.

FINDINGS AND OPINION

(Filed June 29, 1976)

Presented to the Court in the context of this case is the question of the legal right of homosexuals to form a student organization and obtain University recognition of it as a campus organization.

History and Facts of the Case

February 25, 1971, marks the beginning of an attempt on the part of a small group calling itself Gay Lib to gain formal recognition as a student organization at the University of Missouri at Columbia, Missouri. On that date, Gay Lib submitted three documents to the Missouri Students Association (hereinafter referred to as the MSA): (1) a petition for recognition on the forms provided for that purpose by the MSA, (2) a proposed constitution and by-laws, and (3) a statement of the purposes of the proposed organization.[1] Gay Lib's application for recognition was given initial consideration by the Rules Committee of the MSA Senate, which approved it and recommended that the MSA Senate also grant approval. The MSA Senate did so and forwarded the petition and accompanying documents to the Committee on Student Organizations, Government and Activities (hereinafter referred to as SOGA), made up of both faculty members of the University and students.

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[1] "The purpose of the organization Gay Lib shall be:

(a) To provide a dialogue between the homosexual and heterosexual members of the university community.

(b) To dispel the lack of information and develop an understanding of the homosexual at the University of Missouri.

(c) To alleviate the unnecessary burden of shame felt by the local homosexual population.

(d) To help education, the community and the homosexual to understand the social roles that the homosexual now plays in the community.

(e) To work closely with established university and community groups for a broader sharing of knowledge and information."

For reasons not pertinent to this litigation SOGA did not take immediate action on the Gay Lib petition. On November 22, 1971, during the period that its petition was before SOGA but not yet under active consideration, Gay Lib submitted a revised statement of purposes[2] which added detail to the initial brief statement.

On December 22, 1971, SOGA voted 8-5 in favor of recommending approval of Gay Lib as a recognized student organiza-

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[2] The revised Gay Lib statement of purpose provided:

"1. Gay Lib intends to create a forum for the study of the sexual statutes of this state and especially of the sodomy law now in effect. Through study of the intent of the law and of its psychological and sociological implications, it will be possible to more fully understand what the full meaning is of being gay. Through knowledge of the law, it becomes possible to create an atmosphere within which the present statute may be revised or eliminated through an educational and candid look at all ramifications of such laws and their rationale. Changes of other such laws outside of Missouri and in nations such as Great Britain will provide a fuller context.

"2. Gay Lib seeks to promote meaningful communication between all members of the University community, whether homosexual or heterosexual. With candor and compassion on both sides, much of the fear of the unknown can be eliminated and scars of past repression may be healed. This communication is specifically intended to be two-way in nature. The gay world has just as much to learn from the straight world as they have to offer it. We seek to develop an atmosphere in which people are themselves first and sexual entities second.

"3. Gay Lib wants to provide information to the vast majority of those who really don't know what homosexuality or bisexual behavior is. Too much of the same prejudice is now directed at gay people just as it is directed at ethnic minorities.

"4. Gay Lib does not seek to proselytize, convert, or recruit. On the other hand, people who have already established a pattern of homosexuality when they enter college must adjust to this fact.

"5. Gay Lib hopes to help the gay community to rid itself of its subconscious burden of guilt. Society imprints this self-image on homosexuals and makes adjustment with the straight world more difficult.

"6. Gay Lib hopes to function as a channel for those who find difficulty in sexual adjustment. While we do not pretend to

tion.[1] A subcommittee of SOGA members was appointed to assist the Dean of Student Affairs, who was responsible for the next step in the recognition procedure, in implementing the SOGA recommendation.

Edwin Hutchins, then Dean of Student Affairs, vetoed SOGA's recommendation on approval on February 1, 1972, in a letter to Dr. Ray Lansford, SOGA Chairman. Dean Hutchins' letter was the initial step in what became a continuing refusal by the University to recognize Gay Lib as a student organization. Subsequent decisions at higher levels in the University not to recognize Gay Lib were based largely on Dean Hutchins' veto and its reasoning. The clear significance of this letter, therefore, requires that its lengthy text be fully set forth.

> "Dear Dr. Lansford:
>
> "On December 22, 1971, the University Committee on Student Organizations, Government and Activities, meeting in regular session, passed and submitted to me a motion calling for the approval of Gay Lib as a recognized student organization. While I did respond to this resolution at that time, I indicated that at the next regular meeting I would like to present a formal statement regarding my administrative response to this recommendation. There are

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> have psychiatric expertise, we can reach people who do not trust normal channels for such help and enable them to contact professional help as required.
>
> "7. As an educational group, Gay Lib does not advocate any violation of state statutes. We serve as a forum for understanding and knowledge where this is now lacking."

[1] The five dissenting voters, who were all faculty members, submitted a minority report as follows: "A minority disapproves of giving official recognition to the Gay Liberation Organization. This disapproval is based upon the belief that recognition will damage the image of the University of Missouri-Columbia. Recognition gives tacit approval to all that Gay Liberation may stand for irrespective of whether the organization is legal or illegal."

> a number of considerations which I feel should be stated and made a part of the record of the Committee on Student Organizations, Government and Activities.
>
> "The statement of purpose and the organizational structure of the Gay Lib organization are a matter of record in the minutes of the SOGA committee. When recognition of this organization was first requested, after having received a positive recommendation from the Missouri Students Association, the SOGA Committee then undertook to consider the implications of recognition for the general University community and addressed itself to three areas: legal considerations, a concern for the psychological impact on individual students, and a concern for the impact of recognition on the general relationship of the University to the public at large. In my opinion, sufficient time and energy of the concerned parties, members of the committee, and the committee as a whole, were addressed to the first two issues.
>
> "With regard to concerns for the legality of such an organization, no evidence was presented to the committee nor has any come to my attention that would indicate that legal grounds exist for not recognizing the group based upon its stated purpose and objectives. The very essence of the group in their stated purpose is to study the legal and social position of the state vis-a-vis the issue of homosexuality, an issue considered to be of vital concern to a small proportion of our student body and of concern generally in terms of social attitudes and social response. Study of social issues in a manner which will bring light to bear in areas where society has heretofore been poorly informed is compatible with the general objectives of a University. Nevertheless, simply because we are not legally precluded from taking a specific action does not, to my thinking, represent sufficient grounds for doing so. I, therefore, set

aside questions of legality as a basis for my response to this recommendation.

"In my opinion, the committee appropriately raised issues concerning the impact on our campus of such a group as a formally recognized entity. In this regard we must maintain a vital concern for the psychological well being of all our students and specifically those students who, during this period of their growth and development, may, from time to time, be concerned about their own psychosexual problems. On the one hand, recognition of a formal group could conceivably exacerbate such problems and lead to personal and psychological stress for individual students who may be concerned about their sexual identity. On the other hand, the existence of such an organization could conceivably contribute in a productive manner to the development of an atmosphere which would allow students to seek help in dealing with what are, for many, relatively normal kinds of concerns. It is equally conceivable that a forthright and open examination of social response to such individual concerns could be helpful and productive. Having been privileged to hear the discussion between the committee and qualified experts in the fields of medicine and psychology, I am convinced that the issues revolving around the concern for the psychological well being of our students were thoroughly developed and that an enlightened rationale for addressing ourselves to the issue was presented. This has not always been the case in this University with its unique and difficult history in this problem area. If we do not wish to move backward in time, we must be sensitive to the history of our response to this issue and the reasons for it. This, too, was well developed in committee discussion. Since the statement of purpose of the group seeking recognition should be a basis for committee consideration and the purposes and intent of the group

are well stated relative to this issue, the psychological issues which were explored did not appear to form grounds for rejection of the request.

"While we must always keep before us the ideal of a university as an independent, rational, and deliberative body within society, we must recognize as well that the University does not operate independent of the social system that supports it. It is simultaneously cast in the role of a leader in the development of social thought and values and is at the same time an instrument for the transmission of social mores. When we are to determine recognition as a part of the formal university family of an organization whose basic purpose is the study and advocacy of social change in an area of high social sensitivity, we find these two themes in conflict. How we resolve this conflict, what the appropriate University role is, and how we can best develop a positive position are matters that I feel were not thoroughly dealt with in the generation of the recommendation for action on this group.

"In addition to the above major concerns, there are secondary considerations which demand attention. First, the specific history relative to the problems of homosexuality that is unique to this University represents a point of departure for any specific discussion. We cannot in our collaborative decision making ignore in this, or any other issue, the fact that there are certain unique characteristics of our own institution. This is especially important with regard to the questions raised here because the University has not had a comfortable history in this area. A second concern on any issue so complex and sensitive that it raises questions about extreme costs to the institution, has to do with our total decision making process. Unless I am willing as chief student personnel officer to assume decision making responsibility in areas of student concern, we can expect that time

and time again the decision making process will drift from a level close to students and their welfare to an abstract level where day to day student concerns cannot have the appropriate attention that those of us who interact directly with the students might hope to render. For this reason, I did undertake to assume direct responsibility relative to this matter. While such assumption of responsibility is not necessarily palatable to me a concern for the development of our total decision processes made it imperative that I do this. A third consideration deals with the time-table for committee deliberations and decisions. I do not feel that all of the basic issues were sufficiently discussed by the committee. I am concerned that the committee resolution was passed under a time press not compatible with deliberate development of such a complex issue.

"All of the above considerations were thoroughly manipulated in seeking a basis for decision on the matter at hand. Two matters were of primary concern in the decision reached. First, the very strength of the Committee on Student Organizations, Government and Activities lies in the fact that it represents all the major facets of the University community. This committee must rise in its deliberations to a level of statesmanship that represents the University's total well being. As a faculty-student committee, SOGA must serve the general well being of the University community. It will serve us well when it develops fully the capacity to find solutions that have a common ground where all of the advantages and disadvantages to the University are considered in broad prospective. I do not at this point in time presume to have a monopoly on the wisdom which I ask of the committee in deliberating on this complex matter. But I do not feel in its deliberations that the committee completed its task. It is only with regret and reluctance that I would, at any time, overrule a

faculty-student committee recommendation which has been arrived at in due fashion. In this matter, I point to the existence of a minority report and to the fact that there was pressure to operate in a time frame that I do not consider compatible with the total best interests of the University and I, therefore, cannot concur in the recommendation sent forward.

"This negative response to the committee recommendation should in no way be construed as an interpretation that we do not have an issue of importance presented to us, that this is not an area of concern to our students or that such issues will not appear as agenda items in the future. But at this juncture I do not feel that the committee recommendation, lacking as it does the full support of the committee, is one timely for the University."

Shortly after Dean Hutchins' veto, the MSA Senate established a Committee on Sexual Freedom. The "chairone" of this Committee was Lawrence Eggleston, who had also been one of the prime movers behind the Gay Lib application for recognition. The Committee on Sexual Freedom held weekly meetings with rather sparse attendance for the purpose of discussing sexuality. At one such meeting assistant prosecutors from Boone County and Columbia spoke on the impact of law on homosexuals. In late spring 1972, the Committee on Sexual Freedom applied for funding from the MSA budget. The MSA Senate passed a bill endorsing the Committee on Sexual Freedom and approving funding of $25.00 for a subscription to *The Advocate*, a national homophile paper. The funding approved by the MSA Senate never culminated in the receipt of money by the Committee on Sexual Freedom. On December 6, 1972, Edward Thelen, who had replaced Edwin Hutchins as Dean of Student Affairs, sent a memo to Dave Markee, Director of Student Life, expressing his belief that the Committee on Sexual Freedom was a "subterfuge for accomplishing the recognition (of Gay Lib)

vetoed by Dean Hutchins" and directing Markee to refuse to act on requests from the Committee on Sexual Freedom. Lawrence Eggleston unsuccessfully appealed Dean Thelen's position on the Committee on Sexual Freedom to Chancellor Schooling.

On January 22, 1973, the issue of Gay Lib recognition began its way up the hierarchy of appeals within the University system. On that date, the Gay Lib Executive Board asked Dean Thelen to reconsider his predecessor's veto decision of February 1, 1972.[1] Dean Thelen chose to uphold Dean Hutchins' veto.[2] Dean Thelen's decision was appealed to Chancellor Schooling, who on February 28, 1973, upheld it on the grounds that "it would not be in the best interests of the University to extend such recognition." Next in the line of appeal came C. Brice Ratchford, President of the University of Missouri. He concurred fully with the decisions of those below him.[3]

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[1] Despite the lapse of almost one full year since Dean Hutchins' veto of Gay Lib recognition, neither Gay Lib nor the University indicated during the ensuing series of appeals that the issue of Gay Lib recognition was moot or untimely. Appeals were pursued by Gay Lib and processed by the University with the sort of close attention that makes it clear that both parties considered the issue a live one, despite the Committee on Sexual Freedom hiatus. Nothing in the record before this Court indicates that the University could not have refused Gay Lib's appeal on recognition as untimely and required that the group begin the recognition process again from the beginning. The University, however, chose to allow Gay Lib to appeal the almost one year old decision of an administrator no longer holding the position of Dean of Student Affairs. Therefore, allusions in the University's brief to the mootness of the issue of Gay Lib recognition because of the lapse between the original veto and the first appeal are not, at this late date, well taken.

[2] "It is my opinion that Dr. Hutchins' judgment regarding probable public reaction to the recognition of Gay Liberation as a student organization was accurate and worthy of consideration. The University has many publics to serve, and each must be considered when making decisions of this sort. It is my belief that a decision to recognize Gay Liberation is not in the best interests of the total University, and that the damage to the University that could accrue from such a decision outweighs the benefits that might be achieved."

[3] "A review of the purposes of the proposed organization leads me to the conclusion and decision that the purposes are not compatible with the overall educational mission of the University of Missouri and that recognition of an organization with those purposes would not be in the best interest of the University.

"The purposes import an activist role in the Gay Liberation movement. The name itself, "Gay Lib", implies the liberation of homosexuality. These purposes are more than establishing an "understanding and knowledge." They are in fact an attempt to actively promote the practices of homosexuality by claiming that they are acceptable in our society.

"The organization of Gay Lib by applying for recognition is attempting to obtain the tacit approval of homosexuality by the University of Missouri. Homosexuality is generally treated in the State of Missouri as being a socially repugnant concept as is evidenced by the criminal statutes of the State of Missouri. The University of Missouri protects the rights and freedoms of all members of the educational community but it is felt that non-recognition of an organization promoting such a concept is not an infringement of any rights or freedoms."

President Ratchford's decision was appealed to the Board of Curators of the University of Missouri. There was before the Board at this time an appeal on the same issue from the Gay People's Union at the University of Missouri-Kansas City. The Board, therefore, consolidated the appeals from both campuses and referred the matter to its Academic Affairs Committee. This Committee appointed Mr. Cullen Coil, a very able Jefferson City attorney and former Commissioner of the Supreme Court of Missouri, as a hearing officer and directed him to hold a consolidated hearing to develop the facts involving both the Columbia and Kansas City Situations. Following notice to the parties on June 21, 1973, Mr. Coil held a hearing on August 13, 1973, on the Gay Lib request for recognition at the University of Missouri at Columbia.

The 290 page transcript of the August 13, 1973, hearing reveals that both the University and Gay Lib adduced a wide range of evidence on three main issues:

(1) the procedural steps taken by Gay Lib to gain recognition at the University of Missouri at Columbia,

(2) whether homosexuality is normal or abnormal and

(3) whether University recognition of a homosexual organization would produce increased violations of the Missouri Sodomy Law.

There was both lay and expert testimony on such subjects as the history of the Gay Lib movement, whether orgies were standard homosexual practice, the alleged homosexual propensities of a mass murderer in Houston then much in the news, and the detrimental effects on children of "mothers who are overly protective or hostile and rejecting or clinging."

Mr. Coil recommended 24 findings of fact on the basis of the August 13 hearing. A majority of his recommended findings involved the proceedings whereby Gay Lib sought recognition at the University of Missouri at Columbia. However, findings 14-25 dealt with the questions of what homosexuality is, the relationship of homosexual practices to the Missouri Sodomy Statute and the potential impact of University recognition of Gay Lib. Mr. Coil concluded that

"formal recognition by the University of Gay Lib will

"(1) give a formal status to and tend to reinforce the personal identities of the homosexual members of those organizations and will perpetuate and expand an abnormal way of life, unless contrary to their intention as stated in their written purposes, the homosexual members make a concerted effort to seek treatment, recognize homosexuality as abnormal and attempt to cease their homosexual practices;

"(2) tend to cause latent or potential homosexuals who become members to become overt homosexuals;

"(3) tend to expand homosexual behavior which will cause increased violations of section 563.230 of the Revised Statutes of Missouri;

"(4) be undesirable insofar as homosexuals will counsel other homosexuals, i.e., the sick and abnormal counseling others who are similarly ill and abnormal; and

"(5) constitute an implied approval by the University of the abnormal homosexual life-style as a normal way of life and would be so understood by many students and other members of the public, even though, and despite the fact that, the University's regulations for student organizations provide that recognition of an organization by the University does not constitute approval or endorsement of the organization's aims or activities."

On November 16, 1973, the Board of Curators of the University of Missouri passed the following resolution.[1]

"Be it hereby resolved that the Board of Curators of the University of Missouri concurs with and hereby adopts the Hearing Officer's Recommended Findings of Fact made by the Honorable Cullen Coil and further makes the following specific findings of fact:

1. The gay lib movement as exemplified by the Gay Lib Organization at UMC and the Gay People's Union at UMKC is premised upon homosexuality being normal behavior, contrary to the further findings herein.

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[1] Most of the Board of Curator's findings of fact were selected without change from Mr. Coil's recommended findings of fact. The Board of Curator's findings numbered 1 and 3 were, however, composed directly by the Board. Furthermore, Board finding number 6 states only one part of Mr. Coil's recommended finding on this point, which provides in full "There are at least two views held by physicians, particularly by those physicians specializing in psychiatry and psychoanalysis, as to the nature of homosexuality. One view is that homosexuality is an illness and should and can be treated as such and is clearly abnormal behavior. Another view is that homosexuality is not an illness but is only a sexual deviation, described as a mutant or alternative way of expressing human sexuality and is normal behavior."

2. A homosexual is one who seeks to satisfy his or her sexual desires by practicing some or all of the following: fellatio, cunnilingus, masturbation, anal eroticism and perhaps in other ways.

3. Homosexuality is a compulsive type of behavior

4. There are potential or latent homosexuals, i.e. persons who come into adolesence or young adulthood unaware that they have homosexual tendencies, but who have fears of sexual relations with a member of the opposite sex.

5. What happens to a latent or potential homosexual from the standpoint of his environment can cause him to become or not to become a homosexual.

6. That homosexuality is an illness and should and can be treated as such and is clearly abnormal behavior.

7. Certain homosexual practices violate provisions of Section 563.230 of the Revised Statutes of Missouri.

8. That formal recognition by the University of either or both the proposed Gay Lib and Gay People's Union will:"

(The Board of Curators here adopted verbatim Mr. Coil's above-cited conclusions as to the effect of formal recognition.) As a result of this resolution, the instant suit was filed in federal court.

Status of the Parties

Before the Court can address the constitutional issues of this cause, it must rule on the status and propriety of the parties named as both plaintiffs and defendants. There are five plaintiffs named in the complaint: four individuals and Gay Lib. The individual plaintiffs, all members of the Executive Board of Gay Lib, sue on their own behalves and on behalf of Gay Lib and all members thereof, as a class under Rule 23.2 of the

Federal Rules of Civil Procedure. Plaintiffs Napton, Macnamara and Hudson are students at the University of Missouri. Plaintiff Eggleston, formerly a student, is now an employee of the University.

Defendants have moved to drop plaintiff Eggleston from the complaint because he is no longer a student. They contend that because only students may be members of student organizations, Eggleston would not be an adequate class representative and should, therefore, be dropped from the suit. Defendants' motion to drop plaintiff Eggleston is hereby denied for two reasons. First, because this Court will not permit the individually named plaintiffs to sue on behalf of a class under Rule 23.2, the question of Eggleston's adequacy as a class representative is rendered moot. Secondly, although as a non-student Eggleston may not be a "member" of Gay Lib, he may, as a member of the University staff "participate in the activities of student organizations to the extent that he deems proper and its members desire."[1] Heretofore, Eggleston has shown considerable and continuing interest in such participation in Gay Lib. Plaintiff Eggleston may, therefore, join the student plaintiffs in this action, for he asserts a right to relief arising out of the same series of occurrences and this action involves questions of law and fact common to both Eggleston and the other plaintiffs. Federal Rule of Civil Procedure 20(a).

Defendants also move to add as plaintiffs all members of Gay Lib, apparently contending that these members are few in number, and so can be named individually to avoid the necessity for a class action. Defendants have not provided the Court with the names of those members whom they desire to add as individual plaintiffs to defeat class certification, but rather suggest that their mere unidentified existence defeats the numerosity requirement for a class action. Defendants' argument in terms of numerosity misconstrues the nature of plaintiffs' proposed class

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[1] "M Book", p. 54, 1970-71.

action, however, for plaintiffs seek to proceed under the Rule 23.2 procedure for actions relating to unincorporated associations. Because a showing of numerosity is not required under Rule 23.2 and because defendants have provided the Court with no names of suggested additional plaintiffs, their motion to add parties is hereby denied.

An analysis of Rule 23.2 brings this Court to the conclusion that plaintiffs should not be permitted to bring a class suit on behalf of Gay Lib and its members. As indicated above, numerosity is not an element of a class action under Rule 23.2 Rather the purpose of this rule lies in a modern attempt to avoid the common law position that unincorporated associations lacked capacity to sue.[1] Under Rule 17(b), Federal Rules of Civil Procedure, Gay Lib has capacity to bring this action as an unincorporated entity. There is, therefore, no need to allow a class suit under Rule 23.2 on behalf of Gay Lib and its members, because Gay Lib already stands before this Court as an unincorporated association fully competent to represent its own interests, which by definition are the interests of its members. Accordingly, this Court will not certify a class under Rule 23.2 in this action.

The plaintiffs before this Court are, therefore, Lawrence Eggleston, Darrell Napton, Sarah Macnamara, Doug Hudson and Gay Lib, an unincorporated association. Asserting jurisdiction and claims under the First and Fourteenth Amendments to the United States Constitution, Title 28, United States Code, §§ 1343, 2201 and 2202 and Title 42, United States Code, §§ 1981, 1983 and 1988, they seek injunctive and declaratory relief. They name ten defendants: the University of Missouri,

[1] The Advisory Committe Note to Rule 23.2 provides: "The real or main purpose of this characterization (as a class under Rule 23.2) has been to give 'entity treatment' to the association when for formal reasons it cannot sue or be sued as a jural person under 17(b)."

Brice Ratchford,[2] President of the University, and eight members of the Board of Curators of the University of Missouri, both individually and as members of the Board.

Causes of Action and Jurisdiction

Plaintiffs' combination of alleged causes of action and jurisdictional allegations must be sorted out and ruled upon before the constitutional merits of this cause can be addressed.[1] In light of the rather convoluted relationship between the various provisions that plaintiffs have relied upon, the Court deems it appropriate to initially discuss the nature of its jurisdictional analysis before considering plaintiffs' specific allegations. First, and most significantly, plaintiffs have chosen to base their entire suit on only one jurisdictional provision: namely, 28 U.S.C.

[2] Dr. Ratchford within the past month has resigned as President of the University. No suggestion from any party has been made to drop his name as a party or to substitute the name of his successor.

[1] The Court notes that defendants' sole defense of a jurisdictional nature lies in a motion to dismiss or in the alternative to quash service, which is based upon the contention that not all of the exhibits incorporated by plaintiffs in their complaint were served on defendants along with the complaint. In a motion to strike, however, defendants allege that plaintiffs' complaint, which includes all exhibits, is too lengthy for an appropriate answer. The defendants' pleadings and motions indicate to this Court, as does the very nature of the exhibits in question, which consist of Univerity documents and records, that defendants have been in possession of or had access to the exhibits referred to in the complaint since before this action was instituted. Furthermore, all that the Federal Rules of Civil Procedure require is a short and plain statement of the claim sufficient to give a defendant fair notice of the claim and the grounds upon which it rests. *Conley v. Gibson*, 355 U.S. 41 (1957). Therefore, defendants' motion to quash service or dismiss which was taken with the case, is denied. In addition, defendants' motion to strike, which was similarly taken with the case, is also denied. Such motions are not favored and defendants have neither shown that the matters objected to are redundant, immaterial, impertinent or scandalous nor that they lack any possible bearing upon the subject matter of this litigation.

§ 1343.[1] Therefore, jurisdiction as to all their proposed causes of action must stand or fall under that statute and not under the more lenient jurisdictional terms of 28 U.S.C. § 1331.

28 U.S.C. § 1343 provides jurisdiction only for actions "authorized by law". Consequently, each cause of action asserted thereunder must constitute a cause of action created by some other statutory provision. Where a cause of action is not authorized by statute, either because it is not based on a statute at all or because the elements of the statute on which it is based have not been complied with, the result is a lack of jurisdiction under 28 U.S.C. § 1343. Where jurisdiction is invoked under 28 U.S.C. § 1343 alone, failure to state a cause of action upon which relief may be granted (authority by law) requires a dismissal for lack of jurisdiction.[2]

An examination of plaintiffs' specific allegations compels this Court to find that they have failed to state a cause of ac-

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[1] That portion of 28 U.S.C. § 1343 applicable to the present case provides "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person. . . . (3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[2] See *Kenosha v. Bruno,* 412 U.S. 507 (1973); *Prostrollo v. University of South Dakota,* 507 F. 2d 775 (8th Cir. 1974). This merits/jurisdiction distinction under §1343 must be distinguished from the usual approach under 28 U.S.C. § 1331. Because § 1331 applies to all suits "arising under the Constitution" and does not require a statutory cause of action, mere allegation of a deprivation of a constitutional right generally confers jurisdiction under § 1331, so long as the jurisdictional amount has been met. *Bell v. Hood,* 327 U.S. 678 (1946). After an assertion of jurisdiction under § 1331, the proper judicial action upon finding that plaintiffs have stated no cause of action upon which relief may be granted, is to dismiss the cause on the merits rather than for lack of jurisdiction. The merits/jurisdiction distinction is entirely different under § 1343, where a cause of action must be authorized by law and the failure to state a cause of action so authorized also constitutes a failure to invoke jurisdiction. See, 87 *Harv. L. Rev.* 254.

tion upon which relief may be granted under either 42 U.S.C. § 1981 or 42 U.S.C. § 1988. Insofar as 42 U.S.C. § 1981[1] is concerned, the statute itself defines the rights it guarantees in terms of those "enjoyed by white citizens". That this statute was intended to apply to racial discrimination is made clear not only by its unambiguous reference to race but also by the legislative history of the Civil Rights Act of 1866, from which 42 U.S.C. § 1981 is derived in part. According to the United States Supreme Court

> "Congress intended (with the Civil Rights Act of 1866) to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase 'as is enjoyed by white citizens.' That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected."[2]

This Court concludes that the purpose of 42 U.S.C. § 1981 is to provide a cause of action for racial discrimination only. Plaintiffs in the present case have made no allegation of racial discrimination. Therefore, insofar as plaintiffs seek relief under 42 U.S.C. § 1981, they have failed to state a cause of action. This Court, therefore, lacks jurisdiction over their 42 U.S.C. § 1981 claims under 28 U.S.C. § 1343(3).[1]

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[1] 42 U.S.C. § 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[2] *Georgia v. Rachel,* 384 U.S. 780, 791 (1966).

[1] The Court notes that other courts faced with the issue of whether § 1981 should be construed to apply to nonracial varieties of discrimination have quite consistently chosen to limit § 1981 to causes of action based upon racial discrimination. See *League of*

Plaintiffs also allege a cause of action under 42 U.S.C. § 1988.[2] However, as stated in *Moor v. County of Alameda*, 411 U.S. 693 at 702:

> "§ 1988 does not enjoy the independent stature of an 'Act of Congress providing for the protection of civil rights.' Rather, as is plain on the face of the statute, the section is intended to complement the various acts which do create federal causes of action for the violation of federal civil rights."[3]

Accordingly, 42 U.S.C. § 1988 could apply in the present case only in association with some other cause of action. Where there is in fact no cause of action, as against all defendants under § 42 U.S.C. § 1981 and against the University of Missouri under 42 U.S.C. § 1983, 42 U.S.C. § 1988 has nothing to complement and is, therefore, inapplicable. Insofar as plaintiffs state a cause of action under § 1983, federal law is suited and sufficient to furnish appropriate remedies and 42 U.S.C. § 1988 is consequently unnecessary.[1] Plaintiffs have thus failed to state a cause of action under 42 U.S.C. § 1988 or associate it with another cause of action in such a way as to render it applicable here. This Court therefore lacks jurisdiction of plaintiffs' 42 U.S.C. § 1988 claims under 28 U.S.C. § 1343(3).

Academic Women v. Regents of University of California, 343 F. Supp. 636 (N.D. Cal. 1972) and cases cited therein. The only deviation from this pattern has been the tendency to hold that § 1981 applies to aliens as well as to citizens. See, e.g. *Guerra v. Manchester Terminal Corp.*, 498 F. 2d 641 (5th Cir. 1974), *Roberto v. Hartford Fire Ins. Co.*, 177 F. 2d 811 (. . . Cir. 1949), cert. denied 339 U.S. 929.

[2] 42 U.S.C. § 1988 reads, in relevant part: "The jurisdiction in civil . . . matters conferred on the district courts by the (Civil Rights Act) . . ., for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . ., the common law, as modified and changed by the constitution and statutes of the State wherein the Court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . ."

[3] *Moor v. County of Alameda*, 411 U.S. 693 (1973). The Court cites 42 U.S.C. §§ 1981, 1982, 1983 and 1985 as acts that § 1988 may complement.

Plaintiffs also allege a cause of action under the First and Fourteenth Amendments, presumably in jurisdictional conjunction with 28 U.S.C. § 1343. Plaintiffs' allegations under the First and Fourteenth Amendments clearly suffice to constitute the deprivation of rights necessary to a cause of action under 42 U.S.C. § 1983. However, if plaintiffs' First and Fourteenth Amendment allegations are read as a proposed constitutional cause of action asserted directly under 28 U.S.C. § 1343, they do not create a cause of action "authorized by law" and capable of endowing this Court with jurisdiction. The lower federal courts that have faced this precise issue, whether 28 U.S.C. § 1343(3) jurisdiction is conferred by a constitutional claim alone, have generally agreed that "authorized by law" requires that the constitutional claim be embodied in a statutory cause of action such as 42 U.S.C. § 1983 before there can be jurisdiction under 28 U.S.C. § 1343(3).[2] Therefore, insofar as plaintiffs' allegations under the First and Fourteenth Amendments may be read to be part of a direct constitutional cause of action, this Court lacks jurisdiction under 28 U.S.C. § 1343(3).[1]

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[1] Plaintiffs cite no aspect of state law such as an abrogation of sovereign immunity, that would be of possible benefit to them under § 1988.

[2] See e.g., *Harkless v. Sweeney Indep. School Dist.*, 300 F. Supp. 794 (S.D. Tex. 1969), rev'd on other grounds, 427 F. 2d 319 (5th Cir. 1970), cert. denied, 400 U.S. 991: *Kochbar v. Auburn University*, 304 F. Supp. 565 (M.D. Ala. 1969).

[1] 28 U.S.C. § 1331 does not require that an alleged deprivation of constitutional rights be embodied in a statutory cause of action. However, plaintiffs have not asserted jurisdiction under § 1331 or alleged any pecuniary amount in controversy.

Plaintiffs' final jurisdictional allegation involves the conjunction of 28 U.S.C. § 1343 and 42 U.S.C. § 1983.[2] To constitute a cause of action under 42 U.S.C. § 1983, a plaintiff must allege that the deprivation of rights of which he complains occurred at the hands of a person acting under color of state law.

In the past, an alleged deprivation of constitutional or federal rights under color of state law was generally considered sufficient to state a cause of action under 42 U.S.C. § 1983. Because it was either assumed that a person must have been responsible for the deprivation or that the "person" requirement under 42 U.S.C. § 1983 was simply a component of the under color of state law element of a 1983 cause of action, courts did not consider defendants in terms of whether or not they were persons. However, these assumptions no longer control for the Supreme Court has addressed itself to the question of the definition of "person" under 42 U.S.C. § 1983 and has narrowed its meaning so as to exclude certain defendants from liability under § 1983 because they are not persons.

This Court must, therefore, determine whether the defendants named in the present case are "persons" for purposes of 42 U.S.C. § 1983. In making this determination, the status of the University of Missouri must be considered apart from that of the individuals named as defendants. This separation is mandated by the two decisions, *Monroe v. Pape*, 365 U.S. 167 (1961) and *Kenosha v. Bruno*, 412 U.S. 507 (1973), 412 U.S. 507 (1973), that defined certain entities as non-persons under 1983.

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[2] 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Monroe and Bruno Supreme Court Decisions

In *Monroe v. Pape*, the Supreme Court held that in the context of a suit for monetary damages, a municipal corporation is not a person within the meaning of § 1983. *Monroe v. Pape* endowed municipal corporations sued under § 1983 with ghostlike qualities: persons so long as they were sued only for equitable relief, they were mysteriously disembodied by suits for monetary damages. The Supreme Court later terminated this disparity in *Kenosha v. Bruno*, wherein it held that municipal corporations were no longer persons under § 1983 when sued for equitable relief.

The raitonale behind *Monroe* and *Bruno* is not clearly articulated. *Monroe* is based on an analysis of the legislative history of § 1983.[1] *Bruno* is justified by the need to fill the gap in municipal immunity under § 1983 left by *Monroe*. The question that faces this Court in this case is whether, in the light of *Monroe* and *Bruno*, the University of Missouri, a corporation established under the constitution and statutes of the State of Missouri, is a person under § 1983.

The Supreme Court has not yet had occasion to determine whether the holdings of *Monroe* and *Bruno* should be extended to state institutions of higher education. In both *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667 (1973) plaintiffs sought equitable relief from corporate state educational institutions. The Supreme Court did not address the issue of whether or not the defendant universities were persons under § 1983. However, at the time *Papish* and *Roth* were decided, the Court had not yet held that municipal corporations were nonpersons insofar as equitable suits under § 1983 were concerned. Therefore, the Court's assumption in *Papish* and *Roth* that de-

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[1] The Supreme Court did not focus on the meaning of "person" but on Congressional rejection of an amendment that would have imposed broad liability on subdivisions of state government for certain injuries.

fendant universities were amenable to suit for equitable relief was wholly consistent with the then variable characteristics of municipal corporation defendants under § 1983. After *Bruno*, the amenability of state universities to suit for equitable relief under § 1983 can no longer safely be assumed, although a court might *conclude* that *Bruno* does not prevent suit under § 1983 against a state university or college.

Although the dichotomy between suits under § 1983 for monetary damages and equitable relief is now ended, it was against that background that a number of lower federal courts faced the issue of whether a state university was a person when sued under § 1983. Some courts explicitly took the equitable relief-damages distinction into account in their decisions on this question.[1] A few courts specifically disavowed the significance of such a distinction.[2] Other courts analyzed the issue in terms of whether or not the defendant had acted under color of state law, apparently impliedly assuming that the defendant was a person.[3] Still others concluded that a defendant university was not a person under § 1983 because it was or resembled a state agency.[4]

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[1] For example, the court in *Kirstein v. Rector and Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (3 judge court) found a cause of action under § 1983 only for equitable relief. Insofar as plaintiff sought monetary damages, the court held that defendants, which were corporate bodies and agencies of the state, were not amenable to suit under § 1983. This distinction was also applied in *Holliman v. Martin*, 330 F. Supp. 1 (W.D. Va. 1971). In *Wolfe v. O'Neill*, 336 F. Supp. 1255 (D. Alaska 1972), plaintiff sought only equitable relief from defendants which included the University of Alaska, its president and the members of the Board of Regents. The Court found that for purposes of equitable relief, all defendants were § 1983 persons. In *Lee v. Board of Regents of State Colleges*, 441 F. 2d 1257 (7th Cir. 1971), defendant was held to be a person under § 1983 where the relief sought was declaratory.

[2] See *Braden v. University of Pittsburgh*, 477 F. 2d 1 (3d Cir. 1973); *Anthony v. Cleveland*, 355 F. Supp. 789 (D. Hawaii 1973).

[3] See *Green v. Dumke*, 480 F. 2d 624 (9th Cir. 1973); *Brown v. Strickler*, 422 F. 2d 1000 (6th Cir. 1970).

[4] See *Kirstein*, supra note 16; *Anthony v. Cleveland*, supra note 17; *Whitner v. Davis*, 410 F. 2d 24 (9th Cir. 1969); *Sellers v. Regents of the University of California*, 432 F. 2d 493 (9th Cir. 1970).

The Eighth Circuit Court of Appeals Decision Re Jurisdiction

Whatever the basis of the decisions before *Bruno* on the issue of whether a defendant state university or college was a person for § 1983 purposes, *Bruno* casts a sufficiently different light on the entire subject to mandate a reappraisal. The Eighth Circuit Court of Appeals is one of the only courts[1] to have had an opportunity for such reappraisal. *Prostrollo v. University of South Dakota*, 507 F. 2d 775 (8th Cir. 1974), involved a suit against a state university, its president and the Board of Regents, by college students challenging a university parietal rule. The United States District Court for the Southern District of South Dakota held the challenged rule unconstitutional. The Eighth Circuit reversed and remanded, specifically ordering the district court to dismiss the complaint against the University and the Board of Regents for lack of jurisdiction. The Court of Appeals footnoted the reason for this order on remand as follows:

> "We also note that jurisdiction is premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343. Although the defendants have not raised this jurisdictional question, we think it is fundamental that the University of South Dakota and the corporate body constituting the Board of Regents, both political subdivisions of the state, may not be sued under the Civil Rights Act since neither entity constitutes a "person" within the meaning of § 1983. *Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Jorden v. Metropolitan Utilities District*, 498 F. 2d 514 (8th Cir. 1974); cf. *Board of Trustees v. Davis*, 396 F. 2d 730 (8th Cir.), cert. denied, 393 U.S. 962 (1968). The district court erred in assuming it had jurisdiction of plaintiffs' complaint against these defendants under § 1343."

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[1] See also *Samuel v. University of Pittsburgh*, 375 F. Supp. 1119 (W.D. Pa. 1974).

Prostrollo makes it clear that the defendants in the instant case must be viewed from the § 1983 person perspective. Although the Missouri university system is not identical to that of South Dakota, the rationale underlying the *Prostrollo* holding that the University of South Dakota was not a person applies with equal force to the present case. Those cases cited in support of *Prostrollo* clearly transcend the unique circumstances of the South Dakota university system.[1] They go, on the contrary, to the more general issue of the extent of liability created by federal civil rights statutes for subdivisions of state government. In line with the trend toward narrowing such liability, the Eighth Circuit held that the University of South Dakota and its corporate governing board were not "persons" and therefore were not liable under § 1983. Nothing in the record before this Court suggests that the precedent supporting that exclusion from liability should not be equally controlling here.

Furthermore, the relationship of the University of Missouri to the State of Missouri is such that following *Prostrollo* is practically as well as legally mandated. The University of Missouri is "incorporated and created a body politic and shall be known by the name of 'The Curators of the University of Missouri.' "[2] The University, a corporate entity, is governed by a Board of Curators who are appointed by the Governor, with the advice and consent of the Missouri Senate. The University is maintained by the Missouri General Assembly "as it may deem necessary." The structure of the Missouri University system, as established by statute and constitution, is clearly one wherein

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[1] *Bruno* and *Jorden* involved defendants which were municipal corporations. *Moor v. County of Alameda* was based upon an interpretation of the scope of the 1871 Civil Rights Act, from which 42 U.S.C. § 1983 is in part derived. *Davis* concerned the liability of the president and individual members of the Board of Trustees of Arkansas A & M College. *Davis* is not affected by *Bruno*, since the defendants in *Davis* were individual officers and trustees rather than entities with corporate attributes.

[2] VAMS 172.020.

the University has extremely close ties to the state. Although it is an autonomous corporate entity, it is governed by state appointees and entirely dependent on the state for its very lifeblood, money. The evidence convinces that the state-University relationship is as intimate in political reality as it appears in the more abstract realm of statutory and constitutional provisions.

The status of the University of Missouri is, in fact, quite similar to that of municipal corporations, which owe their existence to the state and have been defined as non-persons under § 1983[1] and to that of state agencies, which also enjoy various immunities.[2]

The University Is Not a Person Under 42 U.S.C. 1983

This Court concludes, for the foregoing reasons, that the University of Missouri is not a person under § 1983. This Court therefore, lacks jurisdiction under 28 U.S.C. § 1343(3) over the plaintiff's § 1981, § 1983 and § 1988 claims against the University of Missouri, and those claims must, accordingly, be and are dismissed.[1]

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[1] *Monroe v. Page*, supra; *Kenosha v. Bruno*, supra.

[2] The Ninth Circuit has held that state agencies are not persons under § 1983. *Whitner v. Davis*, 410 F. 2d 24 (9 Cir. 1969). See also *Edelman v. Jordan*, 415 U.S. 651 (1974), where Eleventh Amendment immunity was held applicable to state agencies.

[1] The Court notes that the dismissal of the University of Missouri as a defendant does not change the fundamental nature of this action, as plaintiffs have properly stated a cause of action against those individuals responsible for University policy. For purposes of convenience, however, this Court will not refer to individual defendants by name in the remainder of this opinion, but when speaking of defendants will refer to them collectively as the University of Missouri. This reference is simply shorthand for the name of the president of the University and the individually named members of the Board of Curators and it is not to be read as implying that the University itself, as a corporate entity, is a party to this suit.

Plaintiffs do, however, state a cause of action under § 1983 against the remaining defendants: The persident of the University and the individual members of the Board of Curators. *Monroe, Bruno* and their progeny do not apply to individual defendants. Furthermore, and more fundamentally, the Eleventh Amendment does not immunize individual defendants, albeit state officials, from suits for equitable relief under 42 U.S.C. § 1983.[2] By naming individual Curators as defendants, plaintiffs have avoided the difficulties of entity status under § 1983.

As to the Individual Defendants, a 1983 Cause of Action Is Stated

All individual defendants are persons for purposes of § 1983 and are amenable to suit thereunder if their actions occurred under color of state law. There is no question in the minds of the parties or of this Court that President Ratchford and the individual Curators acted under color of state law in the matters at issue in the instant case. Plaintiffs have, therefore, stated a cause of action under § 1983 against all defendants and this Court has jurisdiction over that cause of action under 28 U.S.C. § 1343(3).

The First and Fourteenth Amendments

The United States Supreme Court has read the First Amendment to include a right to freedom of association which is applicable to the states through the due process clause of the Fourteenth Amendment. *NAACP v. Alabama*, 357 U.S. 449 (1958). Freedom of association is not limited to the physical or social aspects of association. Its core, insofar as First Amendment protection is concerned, is group expression. In-

[2] *Ex parte Young*, 209 U.S. 123 (1908); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Board of Trustees of Arkansas A & M College v. Davis*, 396 F. 2d 730 (8th Cir. 1968).

dividual voices, when joined together as the voice of a group or organization, may command more attention and respect than would the sum of the separate utterances of individual members. An individual who desires to express himself by means of association with others has standing to assert his or her First Amendment right to do so. Furthermore, the group or association itself may assert the right to freedom of association on its own behalf. *NAACP v. Button*, 371 U.S. 415 (1963). Therefore, all plaintiffs in this case have standing in the constitutional as well as in the procedural sense discussed earlier, to assert their right to freedom of association.

The right to freedom of association is essentially coextensive with the other rights protected by the First Amendment. While it exists at state colleges and universities, which "are not enclaves immune from the sweep of the First Amendment," *Healy v. James*, 408 U.S. 169, 180 (1972), it is clearly not absolute. Like other First Amendment rights, freedom of association must be applied "in light of the special circumstances of the . . . environment" of a particular situation. *Tinker v. Des Moines Independent School District*, 393 U.S. 506 (1969). Where the environment is that of a state operated educational institution, the Supreme Court has recognized

> "The need of affirming the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker* at 507.

A university has the inherent right to adopt and enforce rules and regulations, *Esteban v. Central Missouri State College*, 415 F. 2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970), including regulations governing the procedure for recognition of student organizations.[1] *Healy v. James*, 408

[1] In *Healy*, at page 192, Mr. Justice Powell speaking for a majority of the Court wrote, "Mr. Justice Blackmun, at the time he was a circuit judge on the Eighth Circuit, stated: "We . . . hold that a college has the inherent power to promulgate rules and reg-

U.S. 169 (1972). The University of Missouri exercised this regulatory right as to recognition of student groups. Plaintiffs, who availed themselves fully of the University procedure for recognition, have not challenged either the procedural or substantive adequacy of those procedures. Rather, plaintiffs complain that nonrecognition curtailed their constitutional right of freedom of association, denying to them the undisputed benefits that are attached to University recognition. This Court finds that nonrecognition prevented Gay Lib from being eligible to use University facilities for meetings and to receive support out of student activities money.

The Supreme Court made it clear in *Healy v. James* that a denial of such seemingly small benefits may, where a First Amendment right is at stake, rise to the level of a constitutional deprivation. Aside from the nature of the group seeking recognition (an S.D.S. type organization attributed by the college with a predilection for violent behavior solely on the basis of the national reputation of S.D.S.) *Healy v. James* bears some factual similarity to the instant case. The veto of recognition occurred at approximately the same point in the school hierarchy in *Healy v. James* as in the instant case. More significantly, the benefits denied the group by nonrecognition were essentially the same as those involved here.[1] The Supreme Court characterized the denials in *Healy v. James* as impediments to the

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ulations; that it has the inherent power to discipline; that it has the power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct." *Esteban v. Central Missouri State College*, 415 F. 2d 1077, 1089 (C.A.8 1969), cert. denied 398 U.S. 965, 26 L. Ed. 2d 548, 90 S. Ct. 2169 (1976)."

[1] In *Healy v. James* (408 U.S. 169), the "primary impediment to freedom of association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes." Plaintiffs were also denied the use of campus bulletin boards and the school newspaper. The record was unclear as to whether recognition created eligibility to seek funds from the school budget.

freedom of association that could not "be viewed as insubstantial". On the basis of *Healy v. James*, as logically extended to apply to the facts of the instant case, this Court finds that the denial in the instant case of the use of campus facilities and of student activities funds created substantial impediments.

In balancing the right to freedom of association against the state interest supporting its curtailment, the Supreme Court in *Healy v. James* enunciated the burden of proof that is to apply in cases where recognition of a student group is at issue on First Amendment terms. The Court also cited specific types of state interest that would, if proved, be sufficient to justify the abridgment of freedom of association.

The burden is upon the University to justify its decision of rejection. This burden is a "heavy" one, because despite the University's legitimate interest in maintaining order and decorum on campus, a denial of recognition serves as a type of prior restraint of a First Amendment right. See, *Near v. Minnesota*, 283 U.S. 697 (1931); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965). The University of Missouri, therefore, bears the burden of justifying its decision not to recognize Gay Lib.

The Determinative Question and the Pertinent Evidence

The critical and decisive question of whether or not the University of Missouri has met its heavy burden of justifying its decision not to recognize Gay Lib is a close one on the evidence adduced at the trial.

By way of partial summary of the critical testimony Dr. Harold Moser Voth,[1] a highly qualified medical expert in the

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[1] Dr. Voth received his medical degree from the University of Kansas in 1948. He is a certified psychoanalyst, having graduated from the Topeka Psychoanalytical Institute and is a Charter Fel-

homosexual field testified on behalf of the defendants at the evidentiary hearing before the Honorable Cullen Coil as follows:

> "Q. I will ask you, doctor, if you have an opinion based upon a reasonable degree of medical certainty whether the recognition of the group described and connected with the (Gay Lib) statement of purpose would tend to cause the state laws of Missouri on sodomy to be broken?
>
> "A. In the sense that I said a moment ago that the forming of an organization would tend to reinforce the personal identity and behavior of the individual, bringing like people together; in the sense that it would reflect society's implicit, if not explicit condonement of this organization. Yes, I think it would tend to further homosexual behavior. I think it would go on anyway, certainly, but giving it formal status I think would tend to perpetuate it or expand it.
>
> "Q. Are we talking about a near possibility or probability or what?
>
> "A. Well, it is an inference. I think when you institutionalize a cluster of behavior, you are giving it a thrust. You are bound to perpetuate it, as I see it. I can't imagine otherwise.
>
> "Q. But you would get activities which would be in breach of the sodomy laws of the State of Missouri?
>
> "A. Well, if they do those things, then they are going to be breaking the law, right."

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low of the American College of Psychoanalysts, a member of the faculty of the Menninger School of Psychiatry since 1953, a nationally recognized consultant and the author of numerous medical articles in his field. He is also a member of the American Medical Association, the American Psychiatric Association, the Association for the Advancement of Science, the New York Academy of Sciences, the International Psychoanalytic Association, among others. His wide experience includes serving as a practicing psychiatrist in the Armed Services.

In its deposition of Dr. Charles Socarides, likewise a highly qualified expert in the field,[1] the University posed a hypothetical question based upon the factual situation at the University of Missouri, asking whether given that situation, recognition of Gay Lib would, in his opinion, based upon a reasonable degree of medical certainty, cause the sodomy laws of the State of Missouri to be broken. Dr. Socarides answered as follows:

> "I believe that *wherever you have a convocation of homosexuals, that you are going to have increased homosexual activities, which, of course, includes sodomy. It is one of the most prevalent forms of sexual expression in homosexuality.* And I know that for a fact from hearing from my patients, who go to gatherings of homosexuals and where there is a great deal of cruising and a great deal of picking up of partners. So that any gathering would certainly promote such sexual contact."

The testimony of a highly qualified expert, such as are Doctors Voth and Socarides, by way of his professional, expert medical opinion is substantial evidence which a Court as the trier of the facts may accept and ascribe appropriate probative

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[1] Dr. Socarides received his medical degree from New York Medical College in 1947. He interned at St. Elizabeth's Hospital in Washington, D.C. in 1947-48. He received his psychiatric residency training at Bronx V.A. Hospital, Bronx, New York; his psychoanalytic training at Columbia University, receiving his certificate of training in 1952. He belongs to the customary medical associations. He has written and published widely, including a book, "The Overt Homosexual" widely used as a textbook in the field. In 1975 he chaired a panel of the American Medical Association on transsexual surgery and its implication for psychiatry and the practitioner of medicine at large. He is in the private practice of psychiatry and psychoanalysis and also associate clinical professor at Albert Einstein College of Medicine, where he teaches and supervises psychiatric residents in the practice, diagnosis and therapy of emotional disorders. He also gives a course to advance students on sexual development and the sexual deviations, including the diagnosis and treatment of the sexual deviations, sexual perversions and homosexuality. He is on the faculty and lectures in his field of specialty at Columbia University.

value, including the finding that such testimony together with the other credible evidence that supports it meets the heavy burden of proof which the defendants must meet in this case.[1]

The undersigned Court as the trier of facts accepts the above quoted testimony of Doctors Voth and Socarides as being logical, convincing and persuasive on the critical issue of fact as to whether the recognition of Gay Lib by the University would likely result in the commission of felonious acts of sodomy proscribed by the Missouri Criminal Statute on the subject. That statute provides:

"§ 563.230 *The abominable and detestable crime against nature—penalty*

Every person who shall be convicted of the detestable and abominable crime against nature, committed with man-

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[1] Plaintiffs called as its qualified expert in this field Dr. Robert C. Kolodny. Dr. Kolodny is a qualified medical doctor with some training in psychiatry. He is not a psychiatrist. He stated, "the phenomena of homosexuality is the practice between two members of the same biologic sex of sexual activity." * * * "that every individual carries the potential towards homosexuality given certain sets of circumstances or conditions or changes in their lives that might motivate them or interest them in orienting themselves in that direction." He also testified that it is his belief that homosexual behavior is normal behavior. He stated, "Would I be unhappy if a child of mine was functioning as a homosexual? No, sir, I would not . . ." Dr. Kolodny further testified that in his opinion the recognition of Gay Lib would neither increase homosexuality nor homosexual practices on the campus. Dr. Kolodny was asked:

"Q. Do you have an opinion as to what effect the existence of such a group on a university campus would have on the sexual behavior of the student population of the campus?

"A. Yes, I do. I do not believe that there would be any discernible effect upon the sexual behavior of the student population.

"Q. Why do you make that statement?

"A. I make that statement for two reasons primarily. One is my clinical knowledge of human sexual behavior. The second is from actual knowledge of what, in fact has occurred on several campuses where homosexual groups have been allowed to acquire office space, hold social functions, and sponsor university activities. In this situation, in the campuses that I am familiar with where data has been gathered, there has not been a change in the degree of homosexuality—I might alter that—there has not been a change in the percentage of students on that campus who are swinging toward homosexual behavior and leaving heterosexual behavior."

The undersigned Court in the exercise of its functions as the trier of the facts, does not give this testimony a persuasive effect in its consideration of all the testimony in this case. It is well known that the sex drive is a basic drive of mankind and homosexuality according to Dr. Voth and Dr. Socarides can be expected to increase and to include sodomy "whenever you have a convocation of homosexuals."

kind or with beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary not less than two years.[1]

The Websters New International Dictionary (unabridged) defines *sodomy* as:

"carnal copulation with a member of the same sex or with an animal or unnatural carnal copulation with a member of the opposite sex; *specif.* the penetration of the male organ into the mouth or anus of another."

In *Healy v. James*, 408 U.S. 169, after first noting that ". . . it cannot be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later

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[1] There is no attack in this case on the constitutionality of the Missouri Sodomy Statute. In the recent case of *State v. Crawford*, 478 S.W. 2d 314 (Mo. 1972), appeal dismissed 409 U.S. 811, reh. denied 409 U.S. 1051, it was held that the language of this section, in context, and as spelled out by judicial construction and commonly understood meaning of euphemism "the detestable and abominable crime against nature," conveys to persons of common intelligence and understanding, and to the public at large, adequate description of prohibited acts and fixes ascertainable standard of guilt and thus was not unconstitutionally vague and did not deprive defendant of his right to demand nature and cause of accusation against him or deprive him of liberty without due process of law or equal protection of the law as guaranteed by State and Federal Constitution.

they will be denied to the ideas we cherish", the Supreme Court declared: "If this reason (campus activities that were likely to cause a disruptive influence) directed at the organization's activities rather than its philosophy, were factually supported by the record, this Court's prior decisions would provide a basis for considering the propriety of non-recognition. The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action and is likely to produce such action.'" (Citing, *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 434, 89 S. Ct. 1827 (1969).

Certainly it is the law that the University, acting here as an instrumentality of the State, has no right to restrict speech or association "simply because it finds the views expressed to be abhorrent." *Healy v. James* at 187, 188. However, the First Amendment does not require that the University sanction and permit the free association of individuals as a student campus organization where, as the Court now finds from the evidence, that association is likely to incite, promote, and result in acts contrary to and in violation of the sodomy statute of the State of Missouri.[1] The members of Gay Lib, or for that matter any of those on the school campus who desire to do so, are free to express within the law their beliefs and views of homosexuality and of the Missouri Criminal Statutes on that subject. But it is a far different thing to show a right under the First Amendment to receive official school recognition of Gay Lib with all of the associational conditions that are likely to result therefrom. The legitimate interest of the University as a state institution

[1] In *Healy v. James*, supra, at 193, the Court suggests that recognition should be granted if the group could be taken "to have an announced willingness to be bound by reasonable school rules governing conduct." Such language is not appropriate to the facts of the present case where the evidence, which the Court has accepted as credible and persuasive, is that the requested recognition and activities thereunder are of such a basic nature as to likely incite and produce acts of sodomy in violation of state statute.

includes the right to refuse the requested recognition and its concomitants where the result predictably is to bring on the commission of crimes against the sodomy statutes of the State of Missouri.[1]

The Equal Protection Question

Plaintiffs also argue that University nonrecognition of Gay Lib constituted a denial of equal protection under the Fourteenth Amendment in two separate ways. First, plaintiffs contend that because the University had permitted another student organization to sponsor homosexual speakers[2] and had permitted professors to teach that homosexuality was not an illness,[3] nonrecognition of Gay Lib constituted a denial of equal protection. Second, plaintiffs contend that because the University had formally recognized other political and social groups on campus, denial of recognition to Gay Lib was a denial of equal protection.[1]

[1] As recently as March 29, 1976, the Supreme Court has upheld the validity of a sodomy statute of the State of Virginia similar to Missouri's. See, *Doe v. Commonwealth's Attorney*, — S. C. — (1976).

[2] The record shows that the University had, in 1973, permitted the Association of Women Students to sponsor a human sexuality program at which homosexuality was discussed by homosexuals.

[3] Dr. Fred McKinney, Professor of Psychology at the University of Missouri, testified at the hearing before Cullen Coil that he had given lectures teaching the "facts and findings" that homosexuality is not an illness. Dr. Stanley Stahl, Assistant Professor of Sociology and Community Health and Medical Practice, testified at the same hearing that he had tried to teach first and second year medical students that homosexuality is "not a sickness, but essentially a variant form of sexual behavior."

[1] Testimony by Chancellor Schooling at the evidentiary hearing established that the University had, at one time or another granted recognition to Young Democrats, Young Republicans, the SDS and a Socialist Study Group.

The Court notes that on this point the University cites certain events referred to in the record of the attempt by the Gay Peoples

The factual and legal basis offered by plaintiffs in support of their equal protection contentions are meager when compared to those underlying their First Amendment arguments. It is undisputed that the University of a state is subject to the provisions and constitutional restraint of the equal protection clause of the Fourteenth Amendment. The Constitution and its amendments apply to college campuses. *Tinker v. Des Moines School District*, 393 U.S. 503. Minority groups, as well as majority groups, must be given an opportunity to express themselves within the law; for only in this way can our system of peaceful social change be maintained. The Fourteenth Amendment requires that the right or privilege of recognition be accorded on an equal basis and without unjustified discrimination to all who seek campus organizational recognition. However, when recognition of an organization seeking University recognition with all the attendant privileges that flow from such recognition directly presents a situation likely to incite and to produce violation of the state's criminal law proscribing acts of sodomy, that organization may not successfully complain that it has been treated differently from organizations that factually do not present such a clear and present danger of violation of the criminal laws of the state. The equal protection clause was not intended to safeguard a group presenting a clear and present danger of violation of the criminal laws of a state by comparing such a group with other groups who do not present that danger. What otherwise might be an impermissible distinction becomes a permissible distinction.

Also, in all equal protection cases a crucial question is whether there is an appropriate governmental interest furthered by the

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Union at the University of Missouri at Kansas City to gain recognition. Because Gay Lib and the other plaintiffs in the instant case have no connection or affiliation with the Gay Peoples Union at the University of Missouri at Kansas City and plaintiffs did not take part in the Kansas City proceedings, the record of those proceedings is irrelevant to the instant cause.

different treatment. Here, the interest of the state university is not to lend itself to recognizing a campus organization with all the attendant privileges thereof where such recognition is likely to incite and produce the violation of the state's sodomy statutes. This presents an acceptable basis for non-recognition of the organization by the University.

Conclusion

In accordance with the Court's finding and reasons above given, the Court finds the controlling issues against plaintiffs and in favor of defendants.[1] The plaintiffs are not entitled to and are hereby denied all of their requested relief, including their requested relief that plaintiffs grant them their requested campus organization recognition.

IT IS SO ORDERED.

/s/ Elmo B. Hunter
United States District Judge

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[1] Of the several motions taken along with this case, only one remains to be disposed of: plaintiffs' motion for expenses in attendance at a deposition taken by defendants in New York. Under Rule 30 of the Federal Rules of Civil Procedure, the granting of such expenses is left to the sound discretion of the trial court. The Court notes that the cross-examination of Dr. Socarides at his deposition in New York by plaintiffs does not fall within the mandatory purview of F.R.C.P. 26(b)(4)(C). Accordingly, in the exercise of its discretion, this Court hereby denies plaintiffs' motion for expenses of attendance at the deposition of Dr. Socarides in New York.

Supreme Court, U. S.
FILED
NOV 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1977

NO. 77-447

THE UNIVERSITY OF MISSOURI, et al.,
Petitioners,

vs.

GAY LIB, et al.,
Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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Petitioners raise in a rather primitive form the question of whether the Eighth Circuit Court of Appeals violated Rule 52(a) of the Federal Rules of Civil Procedure in reversing the District Court.

After discussing the cases of Gay Students Org. of Univ. of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974), and Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976), the Eighth Circuit states:

> Notwithstanding these decisions, defendants assert that the record in this case contains expert medical testimony which provides a legal justification for withholding formal recognition from Gay Lib. They argue, and the district court found, that recognition of Gay Lib would likely result in imminent violations of Missouri sodomy laws. (App. pp. A-9-10)

In footnote 10 the Court of Appeals states as follows:

> Defendants urge that this court must apply the clearly erroneous rule and sustain the district court's credibility assessment of conflicting testimony in view of the fact that there is substantial evidence supporting the court's finding. We reject this approach for several reasons. First, this court is not bound by the district court's credibility evaluation of witnesses where the evidence is submitted by

> deposition or in other documentary form. . . . Second, even under the clearly erroneous rule, this court has a greater latitude of review than it would in an appeal from a jury verdict. . . . Finally, the critical question is not purely factual, but rather is closely intertwined with legal considerations. The inquiry is not merely whether certain events will occur, but rather, whether imminent lawless activity is so likely as to warrant infringement of First Amendment rights. (App. p. A-10)

The Court of Appeals then discusses the testimony of the Petitioners' two expert witnesses and concludes as follows:

> Even accepting the opinions of defendants' experts at face value, we find it insufficient to justify a governmental prior restraint on the right of a group of students to associate for the purposes avowed in their statement and revised statement of purposes. While it is difficult to articulate generalized standards as to the quantum and quality of proof necessary to justify the abridgment of First Amendment rights, the many Supreme Court cases dealing with prior restraints and other First Amendment issues make clear that the restriction of First Amendment rights in the present

> context may be justified only by a far greater showing of a likelihood of imminent lawless action than that presented here. (App. pp. A-12-14) (Footnotes omitted)

When the Eighth Circuit's opinion is read in this manner, it becomes clear that the applicability of the "clearly erroneous" rule of Rule 52(a) of the Federal Rules of Civil Procedure is irrelevant to its decision.

In the case at bar, the trial court's finding of facts shaded into conclusions of law which permitted the Court of Appeals to rule on an "ultimate" fact to which Rule 52(a) does not apply. This Court, in the case of Baumgartner v. United States, 322 U.S. 665 (1944), stated that the conclusiveness of a "finding of fact" depended on the nature of the materials on which the finding was based, and that the finding even of a so-called "subsidiary" fact might be a more or less difficult

process, varying according to the simplicity or subtlety of the type of "fact" in controversy. The Baumgartner Court said that finding so-called "ultimate" facts more clearly implied the application of standards of law, and so the "finding of fact," even if made by courts below, might go beyond the sort of determination that should not be set aside. The Court stated that even though labeled "finding of fact," the determination may involve the very basis on which the judgment of fallible evidence is to be made, and thus the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by a reviewing court.

This Court has also held that Rule 52(a) does not apply to conclusions that are incorrectly drawn from undisputed facts. These become fact or fact-legal

conclusions which are induced by erroneous legal standards. In the case of United States v. General Motors Corp., 384 U.S. 127 (1966), this Court found that the factual conclusion drawn by the trial court from the basic facts was not a "finding of fact" within the meaning of Rule 52(a). In that case, an action to enjoin the defendants from participating in an alleged conspiracy to restrain trade, this Court said that the findings by the trial judge compelled the conclusion that a conspiracy to restrain trade was proved, and that the trial court erred in its failure to apply the correct and established standard for ascertaining the existence of a combination or conspiracy. The General Motors Court noted that the ultimate conclusion by the trial judge was not to be shielded by the "clearly erroneous" test embodied in Rule 52(a) because the question was not

one of "fact," but consisted rather of the legal standard required to be applied to the undisputed facts of the case. Moreover, the Court stated that the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, "which is the rationale behind Rule 52(a)," played only a restricted role in that case, for it was essentially a "paper case." The General Motors Court went on to say that the case did not unfold by the testimony of eyewitnesses, the testimony of most witnesses having been submitted either by affidavit, by deposition, or in the form of an agreed-upon narrative of testimony given in earlier criminal proceedings, and a vast number of documents having been introduced which bore on the question for decision. In any event, the General Motors Court concluded that it resorted to the record not to contradict the trial

court's findings of fact, but to supplement the trial court's factual findings in order to assist this Court in determining whether the findings of fact supported this Court's ultimate legal conclusion that there was no conspiracy. See also, United States v. E. I. Du Pont de Nemours & Co., 353 U.S. 586 (1957); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

Both the District Court and the Eighth Circuit Court of Appeals held that in order to deny recognition to Respondent organization, the standard established by this Court in Brandenberg v. Ohio, 395 U.S. 444 (1969) and applied to the issue of recognition of a student organization in Healy v. James, 408 U.S. 169 (1972), is that the advocacy or actions of the organization must be "directed to inciting or producing imminent lawless action and is likely to produce such action." The Healy Court held that

recognition can be denied an organization only when it infringes reasonable campus rules, interrupts classes, or substantially interferes with the opportunity of other students to obtain an education. There was no allegation or finding made by the District Court as to whether the Respondent organization broke campus rules, disrupted classes, or interfered with the educational process as such. Furthermore, there was no finding made that the Respondent organization advocated imminent lawless action or that such advocacy was likely to produce the same. This Court's decision in the Brandenberg case has a twofold thrust--first, one must advocate or incite imminent lawlessness; second, the advocacy must likely produce such action. Absent a finding as to advocacy or incitement, the District Court could not uphold the denial of recognition under the Brandenberg standard.

Assuming arguendo that Brandenberg does not require advocacy plus the likely production of lawless action, the District Court could not reasonably infer from the testimony adduced that lawless action would result from the exercise of associational rights which derive from recognition of Respondent organization. The District Court based its finding that recognition of Respondent organization would produce imminent lawlessness solely upon the testimony of its two expert witnesses. It was this testimony that the Court of Appeals reviewed as either "ultimate fact" or "fact-legal." The very question of "imminent lawlessness" is so closely intertwined with the testimony of the expert witnesses that to cede the sole right of decision to the District Court under Rule 52(a) of the Federal Rules of Civil Procedure would violate the Court of Appeals' responsibility to

safeguard the application of this very sensitive area of the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lawrence P. Kaplan, attorney for Gay Lib, et al., Respondents herein, hereby certify that on the 1st day of December, 1977, I served a copy of this document on the Petitioners herein by mailing a copy in a duly addressed envelope with first class postage prepaid to:

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